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THE LAW OF TRADE PRACTICES—II

FALSE ADVERTISING

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ADVERTISING'S ROLE IN THE ECONOMY

Advertising, broadly conceived, includes all representations made by sellers, or their agents, to induce the purchase of a product or service.

Advertising is not limited to representations, written or verbal, that appear in the popular advertising media, such as newspapers or magazines, or on radio or television. Advertising is also involved in the way in which the product itself is presented: the trade name used, the product designation or labeling, and the form of packaging. Advertising is also involved in the way in which the seller represents itself to the public; the middleman that incorporates the word "mill" or "manufacturing" into his corporate name does so because he expects that he will get additional patronage from those who prefer to deal on a direct basis with the producer. Advertising may be acknowledged or it may be concealed; advertising appears not only on the advertising pages of magazines, but it also appears in the form of feature articles or perhaps in the form of dropped names by the writer or performer who is ostensibly engaged in providing instruction or entertainment. The recent "payola" scandal among the radio disc jockeys is a testimonial to the importance of "disinterested" advertising. Indeed there has been some suggestion that advertising need not even be within the range of the consciousness of those to whom it is directed. At least, we have been warned that some advertising specialists have been experimenting with "subliminal advertising" using vision, sound and odors that are just outside the range of conscious awareness.

The representations which make up the substance of advertising are too varied to be catalogued. They may consist simply in a repetition of a trade name, with the objective of conditioning the prospective buyer to react like Pavlov's dogs whenever they purchase a particular

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kind of product. Or the advertisement may make a more rational appeal in seeking to establish consumer preference for the advertised product such as supplying factual or other information with respect to its characteristics, serviceability, price or other advantages.

1. Requisites of a Market-Directed Economy

A market-directed economy depends for its basic efficiency upon the success with which markets perform their economic functions of bringing buyers and sellers together. Full and complete knowledge of what the market has to offer to buyers and sellers is a fundamental requirement of effective markets. Buyers must know what products are available in the market, what the significant differences are among products which are available to serve a particular need, what sellers are offering these several products, and the prices at which these products are being offered. Similarly, sellers must be informed as to the requirements of buyers, both as to quantity and to quality; they need to know what prices buyers are prepared to pay for these products of varying qualities and in various quantities; and they must know something of the qualities and prices of competitors' products.

A market-directed economy is an economy in which society depends upon market responses to the offers of buyers and sellers to provide the signals which direct producers to make capital investments, provide productive capacity, employ labor, and supply the product in the forms and with the quality characteristics which various buyers in the market require. Similarly, buyers depend upon what the market has to offer in planning programs of consumption and saving, in determining what needs and desires will first be satisfied, choosing between a variety of options in such a way as to produce a maximum of satisfaction and of satisfactory living from the sums which are available for expenditure.

The performance of markets determines in large measure the performance of the entire economy. If markets function imperfectly—through imperfect information or manipulation, through misrepresentation or deception—buyers are persuaded to purchase products which are not fully satisfactory and there has been a waste of basic resources, of investment and of manpower. If buyers are deceived with respect to the prices of products, and if thereby markets provide outlets for producers of defective or shoddy merchandise, buyers are not the only ones to suffer; honest advertisers and efficient producers have, in effect, been deprived of equal access to the market and to the attention of the buyers therein. If markets do not function efficiently, providing outlets for the superior products of the more efficient producers, the economy is warped and misdirected in its effort; it be-

comes wasteful—wasteful in the production of the wrong products, wasteful in the production of products by the less efficient producers, wasteful in producing more of some products than is required in relation to other products which might serve more essential requirements.

A satisfactory performance of the market depends upon all buyers and sellers having equal access to the market. Equal access means the opportunity to come to the market with full and complete knowledge respecting what the market has to offer and what the market requires. Those who come to the market have an obligation to conduct their business in such fashion as to facilitate the efficient performance of the essential market roles. They must come prepared to compete on an open and fair basis; they must present their requirements and their products honestly and accurately. Every buyer and seller in the market has a responsibility to preserve the essential functions of the market.

2. Advertising in a Market-Directed Economy

Advertising is without doubt the most important manifestation of competition in the American economy. Advertising is generally credited with having played a strategic part in building national markets for a great variety of consumer goods, thereby providing the foundation for the development of large-scale production and mass distribution. Without advertising the American economy would have a very different prospect, the structure of both production and distribution would be quite different, and certainly the American standard of living would have a different composition.

Advertising has the potential capacity to strengthen and support efficient, soundly functioning markets. With the remarkable advances in the technical arts of communication, it is possible for local and regional markets to be parts of a single national market. A higher degree of informed judgment is theoretically possible than at any previous period in business history. All that is required is that those who control the sources of information make essential facts available and that those competent in the arts of communication disseminate that information. Advertising could contribute to better informed markets, but as one weapon in the arsenal of competition, it is often denied this economically useful function.

Advertising obviously contributes to the imperfections of the market when it is used to make false and misleading representations with respect to products, to spread misconceptions and misunderstanding instead of knowledge of what the market truly has to offer. Increasingly, advertising contributes to imperfect markets by playing a

determinative role in the selection of those who will have access to markets. Where products move to the consumer through mass distribution channels, and where supermarkets, chain stores, and department stores prefer to handle products for which there is an established consumer acceptance, the producer who is unable to engage in intensive advertising to pre-sell the consumer and establish a consumer acceptance which will assure a rapid turnover of his product has but limited access to the market. It is not only false and misleading advertising that adds to the imperfection of the contemporary markets; advertising to establish product differentiation primarily by brand name, rather than by inherent differences in quality, has the effect of segmenting the market and of providing preferred access to the market to those who engage in heavy and continuous advertising. Thus advertising, which in one form is indispensable to the maintenance of efficiently functioning markets, in other forms and applications becomes a critical factor in impairing the functioning of contemporary markets.

Advertising, one of the most widely used methods of competition, has also been a critically important factor in shaping the development of competitive behavior. Advertising is the indispensable instrument for making other forms of competition effective: it calls attention to bargain prices, to improvements in the quality of products, and to the relative superiority of one product as compared with others. Where advertising is the main reliance of competitive strategies, products are developed (or differentiated) to exploit advertising's potentialities. The product becomes the servant of advertising. If the product has genuine and significant differences, advertising can proclaim its advantages across the land. But if the product is in no way different from a score of competing items, this is no embarrassment to advertising; the product may be fitted out with a brand name and a distinctive package, and with advertising's assistance, buyers may be persuaded that it is indeed different—the rose by any other name may be sweeter than Shakespeare imagined. It is not even fatal to profitable sales that the product has no virtues whatever; many patent medicine success stories have demonstrated that it is what the public believes, not what the product does, that counts. And it is advertising's appointed task to make the public believe what is profitable for the advertiser. With all due respect to Professor Parkinson, there is another law which might be stated—the less the factual basis to support claims respecting differences and relative qualities of advertised products, the more exaggerated the advertising claims tend to become. The present concern is not with all of the economic and market problems associated with advertising, as advertising bears on

the functioning of the economy; it is focused only on those misuses of advertising which are false and misleading.

3. *False and Misleading Advertising*

False and misleading advertising is based upon deceit: deceit of the buyer who is thereby led to purchase a product or service which he would not purchase if he were fully informed with respect to all the relevant facts. Advertising may be false and misleading because it makes untrue statements. It may be misleading although every statement is literally true if it supports false and deceptive inferences, if it states only half of the truth, or if it fails to disclose material facts which, if known, would change the buyers' behavior.

The businessman's dilemma with respect to advertising arises from the compulsions of competition. The ever-present imperative that guides all business decisions and shapes all business strategies is the necessity of marketing a product or service at a profitable price. The main obstacle to that achievement lies in the efforts of other businessmen to do likewise. The buyer must not only be informed with respect to the qualities of goods and services being offered, but he must be further persuaded to make his choice coincide with what a particular seller has to offer. The seller, therefore, seeks to persuade potential buyers of the superiority of his ware, its more advantageous price, and of the greater convenience or other advantages of dealing with the specific seller. Where the products of rival sellers are indistinguishable, the individual seller may achieve his sales objectives by offering lower prices. If price competition threatens to impose losses on sellers, they may resort to proclaiming the relative advantages of their wares. To assert superiority of wares requires that the wares be identified by trademark or brand name, by distinctive packaging or other device. Thus, the pressures of competition and the hardships of price competition drive the seller toward product differentiation, real or imagined. The less there is to actually distinguish the products of one seller from another, the more important it becomes to persuade buyers that there are such distinctions, and modest factual statements with respect to product differences inevitably give way to exaggerations and imaginative claims as rival sellers seek to outbid one another for the attention, and the patronage, of buyers. Thus, one may almost say that there is a natural law of advertising rivalry which leads sellers from the realm of fact to the realm of fancy, from truthful and informative advertising to imaginative and deceptive advertising.

As the businessman looks at advertising, he becomes aware of the operation of a kind of Gresham's law, where inflated claims develop progressively with a deterioration in the value of the advertising to

him and probably in the value of the product to the buyer. The truthful advertiser cannot await the harsh education of experience to instruct buyers in the value of his wares over those of his less scrupulous rival. Where misleading advertising shouts, where bargains are offered through fictitious price reductions, where exaggerated claims are made for the performance of a product, where rational recital of common sense virtues gives way to appeals to vanity, stylishness or fear, the scrupulous advertiser is likely to find that a superior product is no guarantee of access to the market, and that the cheaper quality over-advertised merchandise tends to drive the reputable, conservatively advertised product from the market just as truly as cheap money tends to drive good money out of circulation.

4. *Society's Responsibilities for Fair and Functional Markets.*

The rise and spread of false and misleading advertising imposes grave responsibilities upon society. The community cannot remain indifferent to the plundering of consumers, to the helplessness of individual businessmen to deal with unfair and damaging forms of competition, to the destruction of markets' essential function of providing fair and equal access to all buyers and sellers, and to the distortion of the economy as market competition fails to reward the efficient and competent producer with opportunities to maintain and expand his operations. The vast range of products, the technical difficulties of distinguishing material differences between similar products, the succession of model changes, and the general absence of meaningful or intelligible specifications leave even the best informed buyers in a wonderland of indecision and confusion. Furthermore, business has done little to develop grades and standards which would enable the individual consumer to buy more knowledgeably; rather the trend has been to leave him dependent upon a doubtful faith in a well advertised brand name. Whether we consider the quality of pre-packaged foods, the efficacy of drugs, the composition of textiles, the identity of artfully processed furs, the composition of metal products, the capabilities of motors, or the performance characteristics of appliances, we are faced with the obvious fact that in today's market the consumer or buyer is inescapably dependent upon the representations, expressed or implied, which are made by the seller. And even in those areas where the consumer is presumably competent to make a judgment, for example, in a comparison of prices between similar products, the hectic pace of contemporary living seldom permits him to go beyond such comparison shopping as is possible on the basis of the price advertisements appearing in the daily press. Even in this area he buys largely on the basis of hunch, perhaps reinforced by a test comparison of

prices on one or two items (possibly loss leader items) that he hopes gives some assurance that he has chosen to buy where he can to advantage. Even when the consumer fancies himself competent to arrive at an informed judgment, perhaps in the purchase of a new motor car, he is unlikely to penetrate beyond the general styling or the obvious features of performance, such as acceleration and power, to the more important values concerned with durability, operating costs, and reliability. There is no room in today's markets for a reliance upon the ancient doctrine of *caveat emptor*.¹

For the individual businessman, advertising is a genie—a potent servant that may serve him and his customers well, enlarging his markets and permitting him to attain large-scale, economical production, but it may also become an uncontrollable demon threatening him and his industry with rising costs of distribution and with a loss of buyer confidence in both product and advertiser. Once advertising has been adopted as a part of the competitive strategy of an industry, there is little that the business firm can do to keep it within bounds of truth or of reasonable cost. The hazards of false and misleading advertising have long been recognized by the leaders of business. As early as 1911, *Printers' Ink* began a campaign for state legislation to make false advertising a crime. Its model state statute was adopted in 44 states, but enforcement has lacked continuity and vigor. The campaign was further advanced by the advertising industry itself, when the Associated Advertising Clubs at their 1911 Convention launched their "Truth in Advertising" campaign. It was in this climate of critical opinion with respect to the excesses of advertising that the first federal legislation was adopted in 1914.

Society's responsibilities for the control of false and misleading advertising are not based solely on the necessity of protecting consumers or aiding businessmen to behave ethically. The primary reason for governmental action to eradicate false and misleading advertising is to prevent the perversion of the function of markets in the economy. In a market-directed economy, buyer's choices perform a critical function in directing economic activity, determining what products will be produced and what firms shall have an opportunity to continue in production to satisfy consumer requirements, influencing by their purchases the expansion and contraction of different industries and different corporations, and ultimately providing the guide lines for capital investment in the renewal or expansion of productive equipment. Buyers are able to perform this essential function efficiently and in the best interests of the economy only if they have accurate information

¹ Hamilton, "The Ancient Maxim Caveat Emptor," 40 Yale L.J. 1113 (1931).

with respect to all products and services offered in the market—their essential characteristics, their comparative qualities, their relative prices. Society, therefore, has ample reason to be concerned with any practice which impairs the ability of markets to translate the true requirements of buyers into orders for products from those producers who are best qualified to use society's resources of labor, raw materials, and capital efficiently.

The costs of false advertising are thus not to be measured in terms of the sums spent for advertising services, nor in the losses imposed upon competent and scrupulous producers through the diversion of business from them. The costs of false advertising are far greater, for they center in the disruption of the essential services which markets must perform in directing the economy and most seriously they result in an economy that is not satisfactorily adapted to serving the essential needs of the community. Where the necessities of advertising come to rule an industry, the character of the industry and the character of competition in the industry change, and change radically. Product differentiation, even if based on non-existent differences, may become a basic feature of competitive strategy. Where the consumer is unable to judge the quality of the product, as for example with patent medicines, and where the seller does not expect to depend significantly on repeat business, as with fur coats and real estate, the unscrupulous advertiser is virtually without inhibitions in his efforts to capture the customer. Where the product involved is one that the advertiser expects to sell repeatedly to the same customer, the seller is called upon to exercise some restraint in the claims which he makes for his product; in these circumstances the advertising strategy is likely to work on the principle that "repetition means reputation," and by continuous saturation advertising the effort is made to "condition" the consumer to automatic, non-rational buying responses.

If the law is to impose responsibility upon advertisers to avoid false and misleading advertising, then the law must be prepared to enforce its rule on all who do not voluntarily comply. The Congress and most of the state legislatures have addressed themselves to this problem. The resulting case law reveals American business at something less than its best; the Federal Trade Commission seeking to hold back the tide with a few well-phrased principles, and the courts fitting the law, sometimes with expressed misgivings, to the economic facts of modern markets.

FEDERAL LEGISLATION AGAINST FALSE ADVERTISING

The Congress has dealt with false and misleading advertising in interstate and foreign commerce in two general laws and in four special enactments.

1. *The Federal Trade Commission Act of 1914*

The Federal Trade Commission Act, although it made no specific reference to false and misleading advertising, was clearly intended to deal with this problem as one aspect of the unfair methods of competition against which the law was directed.² The prohibition against unfair competition was adopted as a part of an effort to strengthen the federal antitrust laws and to forestall the development of trusts and monopolies, many of which were believed to have attained dominant market positions as a result of predatory and unfair business tactics. Although false advertising was not mentioned in section 5 of the Federal Trade Commission Act, the first two cases decided by the Federal Trade Commission involved false advertising.³ The law did not define "unfair methods of competition," leaving the Commission to determine what practices were unfair competition in the light of the facts of particular market or industry situations. The jurisdiction of the Commission under the 1914 act was held to demand three prerequisites: That the methods of competition be unfair, that they be methods of competition in commerce, and that the halting of the unfair methods of competition be in the interests of the public.⁴

In the administration of the prohibition against "unfair methods of competition of commerce," the Commission soon encountered setbacks as the courts failed to uphold the Commission's determinations of what constituted "unfair competition," and a substantial public interest.⁵

The ultimate demonstration of the inadequacy of the Commission's authority came in the first *Raladam* case. Here the Commission's cease and desist order was issued against the advertising of

² Section 5 of the Act provides:

That unfair methods of competition in commerce are hereby declared unlawful.

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be in the interest of the public, it shall issue and serve . . . a complaint stating its charges . . . and containing a notice of a hearing. . . . Federal Trade Commission Act § 5, 38 Stat. 719 (1914), 15 U.S.C. § 45(b).

³ F.T.C. v. Circle Cilk Co., 1 F.T.C. 13 (1916); F.T.C. v. Abbott & Co., 1 F.T.C. 16 (1916). Textile products containing no silk were advertised as "cilk" and "silk."

⁴ F.T.C. v. Raladam Co., 283 U.S. 643, 646-647 (1931); F.T.C. v. Klesner, 280 U.S. 19 (1929).

⁵ "The words 'unfair methods of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include." F.T.C. v. Gratz, 258 U.S. 421, 427 (1920). See also F.T.C. v. Klesner, *supra* note 4, at 28.

Marmola, an obesity cure, as a safe and effective preparation for weight reduction. It contained "desiccated thyroid" and its use without competent medical supervision could impair health. The Commission was reversed because of a deficiency in its findings: it did not establish that there was prejudice or injury to any competitor.⁶

2. *The Wheeler-Lea Amendment of 1938*

Acting on the recommendations of the Federal Trade Commission, Senator Wheeler, on January 14, 1935, introduced a bill to amend section 5 of the Federal Trade Commission Act to prohibit unfair or deceptive practices in or affecting commerce.⁷ When this bill died on the Senate calendar, its successor provided also for improvement of enforcement procedures and orders of the Commission not appealed were to become final in sixty days; but the principal argument continued to emphasize the evils of false advertising and the difficulties of the "competitors test."⁸

In spite of much support, S. 3744 died in the House Committee, and was succeeded by S. 1077⁹ (75th Cong., 1st Sess.), which ultimately

⁶ "It is obvious that the word 'competition' imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured. It is that condition of affairs which the Commission is given power to correct and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public." *F.T.C. v. Raladam Co.*, *supra* note 4, at 649. Mr. Justice Sutherland does not make what, to the economist, is the vital distinction between injury to competition and injury to competitors.

⁷ S. 944, 74th Cong., 1st and 2d Sess. See S. Rep. No. 46, 74th Cong., 1st Sess. (1935).

⁸ S. 3744, 74th Cong., 2d Sess. See S. Rep. No. 1705, 74th Cong., 2d Sess. (1936).

⁹ It was primarily concerned with amending section 5 and with providing procedural improvements. Senate Report No. 221, 75th Cong., 1st Sess., stated:

. . . Section 5 of the present act declares unlawful unfair methods of competition in commerce, and the pending bill amends that section by also declaring unlawful, unfair or deceptive acts and practices in commerce. Under the present act it has been intimated in court decisions that the Commission may lose jurisdiction of a case of deceptive and similar unfair practices if it should develop in the proceeding that all competitors in the industry practiced the same methods, and the Commission may be ousted of its jurisdiction, no matter how badly the public may be in need of protection from said deceptive and unfair acts. Under the proposed amendment the Commission would have jurisdiction to stop the exploitation or deception of the public, even though the competitors of the respondent are themselves entitled to no protection because of their engaging in similar practices. It further appears that much time and money must now be expended in order to establish competition and to show injury to competitors, as the courts have held that competition and injury to the same must be established in order for the Commission to retain jurisdiction. Under

became the Wheeler-Lea Act of 1938. However, the significant revisions involving false advertising originated in the House, where legislation relating to food, drugs, and cosmetics was under consideration. S. 1077 was consequently reported to the House with amendments, including the direct prohibition of false advertising and statutory definitions of false advertising that simplified enforcement.¹⁰

The Wheeler-Lea amendments to the Federal Trade Commission Act were approved on March 21, 1938. Section 5 was strengthened to declare unlawful not only unfair methods of competition, but also "unfair or deceptive acts or practices in commerce."¹¹ Revisions in enforcement procedures provided that the orders of the Commission shall become final within sixty days unless appealed and that a penalty of \$5,000 for each violation of a final order may be imposed.¹²

The provisions of the Wheeler-Lea Act with respect to false advertising are broad and strong. Section 12 makes it unlawful to disseminate any false advertisement in commerce by any means "for

the proposed amendment, if the Commission should have reason to believe that unfair and deceptive acts and practices are being engaged in, and that it is in the public interest that they be stopped, it could issue its restraining order without being put to the necessity of establishing competition and injury to such competition. . . .

¹⁰ H.R. 1613 (Aug. 19, 1937), to accompany S. 1077, 75th Cong., 1st Sess., stated the case for the advertising amendments as follows:

Salesmanship and advertising are inextricable from the promotion and operation of business under our economic system. They have the common purpose of inducing the purchase of the seller's product. . . . Reasonable latitude must be conceded to the salesman and advertiser in boosting his own product.

On the other hand, we cannot ignore the evils and abuses of advertising; the imposition on the unsuspecting; and the downright criminality of preying upon the sick as well as the consuming public through fraudulent, false, and subtle misleading advertisements.

The provisions of this bill covering false advertising are far-reaching but we believe entirely warranted, necessary for the effective control of illegitimate advertising and yet drawn with due regard to the rights of legitimate advertising. We believe the legislation is based on necessity and sound reason and that due discrimination has been made in applying penalties to fit the varying magnitudes of the offenses involved.

Among the most obvious needs of the Federal Trade Commission Act are those giving more effective control over advertisements affecting the public health and fraudulent impositions as to its food and medical supplies.

The advertising amendments to this bill revolve around the definition of a "false advertisement" in Section 15. A false advertisement is defined as one "which is misleading in a material respect." . . .

¹¹ Federal Trade Commission Act § 5, 52 Stat. 111 (1938), 15 U.S.C. § 45(a), amending 38 Stat. 719 (1914).

¹² Federal Trade Commission Act §§ 5(g)(1), (l), 52 Stat. 111 (1938), 15 U.S.C. §§ 45(g)(1), (l), amending 38 Stat. 719 (1914).

the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics," and any such dissemination is made an unfair or deceptive act or practice in commerce within the meaning of section 5.¹³ Section 15 defines "false advertisement" as "an advertisement, other than labeling, which is misleading in a material respect;" and it may be misleading not only by reason of representations made or suggested, but also if "the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity . . . under the conditions prescribed in said advertisement, or under such conditions as are customary or usual."¹⁴ The Commission follows its established procedure of investigation, hearings, and cease and desist orders in the enforcement of the prohibitions against false advertising. However, the Commission may seek an injunction pending the issuance of its order when such action appears to be in the public interest.¹⁵ A penalty of \$5,000 and a prison sentence of six months for the first conviction (\$10,000 and a year in prison for subsequent convictions) is provided for the dissemination of false advertising "if the use of the commodity advertised may be injurious to health because of results from such use under conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead."¹⁶ However, no publisher or advertising agency is liable under this section unless it refuses on request to furnish the Commission with the name and address of any advertiser causing the dissemination of such false advertisement.

3. *Wool Products*

The campaign for honest presentation of products took another step forward with the adoption of the Wool Products Labeling Act

¹³ Federal Trade Commission Act § 12(a), 52 Stat. 115 (1938), 15 U.S.C. § 52(a).

¹⁴ Federal Trade Commission Act § 15(a), 52 Stat. 116 (1938), 15 U.S.C. § 55(a)(1). Section 15 also provides definitions of "food, drugs, devices and cosmetics." The Commission may still proceed against deceptive labeling under section 5.

An exception to section 15(a), defining false advertisement, is made with respect to statements to the medical profession:

No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

¹⁵ Federal Trade Commission Act § 13(a), 52 Stat. 115 (1938), 15 U.S.C. § 53(a). The statute makes provision for excluding from such injunctions the circulation of newspapers and periodicals with regularly scheduled publication dates.

¹⁶ Federal Trade Commission Act § 14(a), 52 Stat. 115 (1938), 15 U.S.C. § 54(a).

of 1939.¹⁷ The protection of the consumer and the safeguarding of fair practices in merchandising are to be accomplished by requiring informative labeling.¹⁸ A wool product is any product containing, or purporting to contain, wool.¹⁹ The informative label must show the percentages of "wool," "reprocessed wool," or "reused wool," the percentages of any other fiber constituting more than 5 percent, and the name of the manufacturer; any manufacturer or distributor of wool products is made responsible for correcting any label not containing the requisite information.²⁰ A wool product lacking the prescribed label is misbranded. Any person who manufactures or ships in commerce any wool product which is misbranded within the meaning of the Act and the rules and regulations adopted by the Commission²¹ "is guilty of an unfair method of competition, and an unfair and deceptive act or practice in commerce" within the meaning of section 5 of the Federal Trade Commission Act.²²

4. *Fur Products*

The Fur Products Labeling Act²³ adapted the principles of informative labeling to a product category that was particularly prone

¹⁷ Wool Products Labeling Act of 1939, 54 Stat. 1128 (1940), 15 U.S.C. §§ 68-68j.

¹⁸ In H.R. Rep. No. 907, 76th Cong., 1st Sess., the necessity for the bill was stated in these terms:

Heading the list of materials used in the manufacture of garments as in widest use and most subject to the use in manufacture of shoddy, rags, and reclaimed or reused wool fibers, the testimony shows that, of some 500,000,000 pounds of wool fabricated into garments annually, nearly one-third of it comes under the heading of reused wool. . . .

This legislation, while strongly endorsed by wool and stock growers and farm organizations generally, is not simply or even mainly to benefit the wool industry, but to protect the 90 percent of the American people who must, as the hearings disclose, purchase garment suits at a cost of \$25 or less. . . .

The movement originated, not with the groups pressing for this legislation, but with unfair and deceptive acts and practices originating in the industry. The legislation is a logical and necessary part of the growing body of legislation to protect the consuming public in the field of food, drugs, meat inspection, honest weights and measures, and only recently by the passage by the House of a seed-labeling act much more drastic than the pending bill.

¹⁹ Wool Products Labeling Act of 1939 § 2(e), 54 Stat. 1129 (1940), 15 U.S.C. § 68(e).

²⁰ Wool Products Labeling Act of 1939 § 4, 54 Stat. 1129 (1940), 15 U.S.C. § 68f.

²¹ Rules and Regulations under the Wool Products Labeling Act of 1939, Promulgated by the Federal Trade Commission, effective July 15, 1941, as amended August 1, 1949 and November 14, 1953.

²² Wool Products Labeling Act of 1939 § 3, 54 Stat. 1129 (1940), 15 U.S.C. § 68a.

²³ Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. §§ 69-69j.

to misrepresentations and where the average consumer was quite helpless in judging the true qualities of the garment.²⁴

The law provides that a fur product is misbranded if it is falsely or deceptively labeled, if the label contains any form of misrepresentation or deception, or if the label does not plainly show certain enumerated facts. Thus, a label must give the proper name of the animal from which the fur comes, disclose if it contains used fur, specify if it is dyed or artificially colored, indicate any use of "paws, tails, bellies, or waste fur," and give the name of the manufacturer and the country of origin.²⁵ The same information must be contained in any advertisement and on the invoice.²⁶ It is also falsely invoiced if it contains "any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur." To implement this provision, the Commission's Rules and Regulations deal not only with the matters enumerated in the act, but also prohibit fictitious and deceptive pricings on invoices and in advertising.²⁷ The misbranding or false advertising and invoicing of furs and fur products is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.²⁸

5. *Textile Fibers*

Technology as well as art can leave the consumer incompetent to judge products. Such is the situation with respect to the synthetic fibers. In recognition of the confusion arising from the multiplicity of trade names to describe various man-made fibers, Congress enacted the Textile Fiber Products Identification Act in 1958.²⁹ As with fur products, the Textile Fiber Products Act seeks to deal with both misbranding and false advertising. A textile fiber product is misbranded "if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified." A stamp or tag must

²⁴ S. Rep. No. 78, 82d Cong., 1st Sess., Feb. 5, 1951, to accompany S. 508, explained the objectives of the legislation:

This bill has a two-fold purpose: (1) to protect consumers and scrupulous merchants against deception and unfair competition resulting from the misbranding, false or deceptive advertising, or false invoicing of fur products and furs, and (2) to protect our domestic fur producers against unfair competition.

²⁵ Fur Products Labeling Act § 4, 65 Stat. 177 (1951), 15 U.S.C. § 69b.

²⁶ Fur Products Labeling Act § 5, 65 Stat. 178 (1951), 15 U.S.C. § 69c.

²⁷ Rules and Regulations under the Fur Products Labeling Act, as amended May 15, 1961. Rules 11 and 44.

²⁸ Fur Products Labeling Act § 3, 65 Stat. 176 (1951), 15 U.S.C. § 69a.

²⁹ Textile Fiber Products Identification Act, 72 Stat. 1717 (1958), 15 U.S.C. §§ 70-70k.

designate each natural or manufactured fiber "by its generic name in order of the predominance of the weight thereof" and must give the percentage by weight of each fiber content. The stamp or tag must also contain the name of the manufacturer and, if imported, the country of origin. Finally, a textile fiber is falsely or deceptively advertised "if any disclosure or implication of fiber content is made . . . unless the same information as that required to be shown on the stamp, tag, . . . is contained in the . . . advertisement." But the advertisement may contain other information not violating the provisions of the act.³⁰ Misbranding or false or deceptive advertising is made unlawful and an unfair method of competition and an unfair and deceptive act or practice in commerce.³¹

THE COMMISSION'S POLICING OF ADVERTISING

The states preceded the federal government in the enactment of legislation directed against false and misleading advertising, but with the increasing importance of national markets, it is federal regulation of advertising by the Federal Trade Commission which has come to pace this effort to define the plane of competition. What the Commission is able to accomplish is determined by the scope of its legislative authority, by the agency's annual budget, and by the interpretations placed on its powers by the courts. A relatively large number of the Commission's orders directed against false advertising are appealed to the courts, even when it is obvious that the courts have little sympathy for those who would practice brinkmanship in the hawking of their wares. The reason for the high incidence of appeals to the courts lies in the fact that pending a final court ruling, the advertising practice can be continued, often to the great profit of the advertiser.³²

³⁰ Textile Fiber Products Identification Act. § 4, 72 Stat. 1719 (1958), 15 U.S.C. § 70b.

³¹ Textile Fiber Products Identification Act § 3, 72 Stat. 1718 (1958), 15 U.S.C. § 70a. See also Rules and Regulations under the Textile Fiber Products Identification Act, effective March 3, 1960, as amended May 14, 1960, and July 26, 1960.

³² A classic case is that of *Carter Products v. F.T.C.*, 268 F.2d 461 (9th Cir. 1959).

The Commission's case against Carter Products involved unfair and deceptive acts and practices associated with the advertising of Carter's Little Liver Pills. The Commission's original order in 1951 (47 F.T.C. 1137) was set aside on the ground that cross-examination of a witness had been unjustifiably restricted, 201 F.2d 446 (9th Cir. 1953). On certiorari, the Supreme Court instructed that the Commission be authorized to reopen the proceeding for further evidence and a new order, 364 U.S. 327 (1953). New findings were made and a new order entered in 1956 (53 F.T.C. 307), which were upheld by the Court of Appeals, 268 F.2d 461 (9th Cir. 1959). Over sixteen years of litigation were terminated with a denial of certiorari on November 9, 1959, 361 U.S. 884.

The Commission has employed several procedures in meeting the challenge of false and misleading advertising. Its informal proceedings have included negotiations with offending advertisers to arrive at consent settlements to end offending practices, the drafting of Trade Practice Conference Rules in cooperation with industry representatives, and the issuance in recent years of Advertising Guides which are administrative interpretations of the legal precedents of Commission and courts applied to the facts of a particular industry or to the practice of a particularly common and objectionable form of advertising. The hard core of the Commission's policing of advertising is accomplished through its formal proceedings wherein the analysis of the industry's or company's practices is accompanied by specific findings as to competitive or deceptive effects and the issuance of mandatory cease and desist orders. In the testing of these rulings through appeals to the courts, the legal criteria of false and misleading advertising have been refined, but the capacity of the Commission to issue effective orders has been somewhat compromised.

1. *The Concern for Advertising*

At first, the Commission treated misleading advertising as perhaps the most prevalent form of unfair competition. The use of advertising deceptively may be a direct form of unfair competition or an ancillary aspect of other unfair schemes.³³ The Commission's

The Commission's complaint against the advertising claims of Carter Products covered 16 pages of printed transcript. Carter's answer was largely concerned with averring that the Commission attributed meanings to Carter's therapeutic claims which Carter did not intend in making the claims, that some of the advertising claims had been abandoned, and that some were permissible trade puffery or sales talk. The ultimate issue was concerned with whether the pills had any therapeutic value with respect to the functioning of the liver or bile.

During the trial, Carter exhausted all the technical devices for delay. The Commission's findings, dated October 4, 1956, set forth in twenty separate and numbered paragraphs the false advertising claims made by Carter. In substance, the Commission found that most of the exaggerated claims for improving one's sense of well-being, stimulating the liver, and providing an effective remedy for constipation were false. It found specifically that Carter's Pills have no therapeutic action with respect to the liver or bile, that they are not based upon any principal of natural bowel mobility, that they contain strong laxatives, that the habitual use of Carter's will actually tend to produce irregularity, that the pills are not safe for or harmless to all individuals, that they will not help the digestive system, etc. The Commission's order required Carter to desist from using the word "liver" in describing its pills and from a long series of advertising claims that had been part of the patent medicine advertising literature for two generations. The Court of Appeals found the Commission's order to be reasonably related to the statutory objective of preventing false and misleading claims. Carter's Pills are still marketed and still advertised.

³³ See, for example, F.T.C. Annual Report, June 30, 1936, at 64-71.

already large responsibilities for policing false advertising became a monumental task with the enactment of the Wheeler-Lea amendments to the Federal Trade Commission Act in 1938.

Currently all television networks submit commercials disseminated during one week in each month; television stations submit scripts covering a 24-hour period four times a year. Radio stations submit continuities for a 24-hour period every 3, 6, or 12 months, depending on their size and location. Twenty-five newspapers, distributed geographically and representing metropolitan and rural areas, and ten magazines are surveyed each week.³⁴

2. *Informal Procedures*

a. *Consent Settlements*

The Commission has always employed a consent procedure for disposing of minor violations of law. Until 1961, when investigations revealed that a violation had occurred through ignorance or misunderstanding and that the offender was willing to discontinue the practice, the Commission's staff prepared a stipulation of facts and an agreement to cease and desist from the unlawful practice. The party could then present additional facts and discuss the matter informally. If, thereafter, the party signed the stipulation, the case was closed. All stipulations were for the public record. In event of subsequent violation, the stipulation could be introduced in evidence in any formal proceeding. The stipulation procedure was not available in cases of serious violations of the trade laws: false advertising of food, drugs, devices, or cosmetics considered inherently dangerous; the sale of highly flammable and dangerous fabrics and wearing apparel; restraints of competition through conspiracy or discriminatory or monopolistic practices.³⁵

³⁴ F.T.C. Annual Report, 1961, at 30. In its Annual Report for 1939, at 138, the Commission reported that 62.7 percent of the questioned advertising related to drug preparations, cosmetics, health devices and contrivances, and food products, as follows:

Drugs, etc.	42.4
Cosmetics and Toiletries	10.4
Food products (including beverages)	7.8
Health devices, instruments, etc.	2.1
Commodity sales-promotion plans, with agency and employment offers	6.8
Automobile, radio, refrigerator, and other equipment lines	5.3
Correspondence courses	3.3
Other products, including apparel, tobacco products, pet breeding, poultry raising, gasoline and lubricants, specialty building materials, etc.	21.9
	<u>100.0</u>

³⁵ In 1960, the last year for which data were published, the Commission approved 103 stipulations, a majority of which were concerned with deceptive advertising: 15

The Rules of Practice, Procedures and Organization of June, 1962, provide a consent order procedure, but make no mention of stipulations. Where time and the public interest permit, the Commission gives notification of its intent to issue a complaint, accompanied by the proposed complaint and an order. The party has ten days in which to decide to accept a consent order, and an executed agreement embodying the order must be submitted to the Commission within thirty days. The order may contain a statement that it is for settlement purposes and does not constitute an admission of guilt. The Commission may accept the agreement and issue its complaint and decision, including the order agreed upon, or it may reject the agreement, issue its complaint, and set the matter down for adjudication.

b. *Trade Practice Conference Rules*

The Commission has used the trade practice conference as a device to obtain industry-wide voluntary compliance with the laws which it administers. It represents a cooperative undertaking by the Commission and the members of an industry to draw up a code of conduct for the industry. A proposal for a trade practice conference may come from members of an industry or it may originate with the Commission. The Commission authorizes a conference when it foresees an opportunity to advance the observance of sound competitive principles in an industry, or when there is an opportunity to secure more adequate or equitable law observance, or when it appears to be otherwise in the public interest.

All members of an industry are notified of a trade practice conference and invited to attend for the purpose of making suggestions and discussing proposed rules. Thereafter a draft of the proposed rules is prepared by the Commission's Division of Trade Practice Conferences. The draft is mailed to all members of the industry and is released to the public with notice of a public hearing in the Federal Register. Members of the industry and the general public are invited to appear at the public hearing or to submit any comments in writing. The final rules are then prepared for approval and promulgation by the Commission. The Trade Practice Rules fall into two classes: those which define practices which the Commission considers to be violative of law, and those which reflect the industry's views as to desirable or undesirable practices. Compliance with the Trade Prac-

concerned guarantees of appliances and other products; 3 involved arthritis or rheumatism remedies; 8 related to deceptive pricing claims; 23 covered misbranding, false invoices and false advertising of fur products; 15 related to wool products. F.T.C. Annual Report, 1960, at 90-92.

tice Rules is sought on a voluntary basis, but if necessary, the Commission may proceed with formal complaints.³⁶

As of June 30, 1961, trade practice rules were in effect for 162 industries. During the year, the Commission's staff disposed of 513 rule compliance matters and 286 rule interpretations. Much of this work involves conferences with various trades and industries relating to advertising practices.³⁷

c. *Advertising Guides*

On September 15, 1955, the issuance of the Cigarette Advertising Guides inaugurated a new program to promote voluntary compliance with the Commission's standards of advertising. The proceedings for the adoption of guides were initiated by a Commission directive, accomplished through inviting comments from interested parties, and adopted after a study of the applicable legal precedents and a consideration of all suggestions and comments received.³⁸ In the Guides Against Deceptive Pricing, the Commission set forth the principles which it considers controlling with respect to administering the laws against false advertising:

1. Advertisements must be considered in their entirety and as they would be read by those to whom they appeal.
2. Advertisements as a whole may be misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposely printed in such way as to mislead.
3. Advertisements are not intended to be carefully dissected with a dictionary at hand, but rather to produce an impression upon prospective purchasers.
4. Whether or not the advertiser knows the representations to be false, the deception of purchasers and the diversion of trade from competitors is the same.
5. A deliberate effort to deceive is not necessary to make out a case of using unfair methods of competition or unfair or deceptive acts or practices within the prohibition of the statute.
6. Laws are made to protect the trusting as well as the suspicious.
7. Pricing representations, however made, which are ambiguous will be read favorably to the accomplishment of the purpose of the Federal Trade Commission Act, as amended, which is to prevent the making of claims which have the tendency and capacity to mislead.³⁹

³⁶ 16 C.F.R. §§ 2.21-2.30.

³⁷ F.T.C. Annual Report, 1961, at 64-65.

³⁸ Tire Advertising Guides, adopted May 20, 1958, Fed. Reg., May 29, 1958.

³⁹ Guides Against Deceptive Pricing, adopted October 2, 1958.

The Cigarette Advertising Guides are credited with facilitating the elimination of some 62 questionable claims involving 30 different brands of cigarettes, the most notable being the discontinuance of all "tar and nicotine" claims by the leading manufacturers.⁴⁰ The Tire Advertising Guides were considered particularly helpful with respect to the marketing of retreaded tires.⁴¹ The Guides Against Deceptive Pricing provided an instrument for promoting easier and wider compliance on industry- and area-wide bases. The Guides Against Bait Advertising, adopted October 2, 1958, provide consumers with a ready means for identifying schemes which involve advertising a popular product at a sensationally low price to attract customers into a store so that they can be switched to higher priced products or unknown brands. The Guides Against Deceptive Advertising of Guarantees⁴² informs the advertiser of the standards of precise disclosure which he must observe. The recently intensified advertising campaign to encourage individuals to provide their own shelters against atomic attack has brought the issuance of Guides for Advertising Fallout Shelters.⁴³ Guides for Advertising Allowances deals with a frequent and troublesome source of complaints under the Robinson-Patman Act.

The advertising guides serve a dual purpose of providing guidance for those members of the industry who wish to comply with recognized legal standards and providing consumers with the means of recognizing and avoiding deceptive sales appeals. Their effectiveness depends upon the fact that the Guides give notice to industry and commerce of the criteria which are currently being used by the Commission and its staff in evaluating advertising claims and issuing formal complaints.

3. *Formal Proceedings*

The Commission's formal proceedings constitute the foundation of its work in mitigating the evils of false advertising. The formal cases provide the occasion for the analysis of industry practices and of economic effects of various false advertising gambits on competition and on consumers. New deceptive schemes are constantly being devised; old evils appear in slightly modified guise in other industries; the task of police surveillance is endless. Most of the Commission's new rulings are challenged in the courts. Indeed many well-established principles of trade regulation respecting advertising are challenged

⁴⁰ F.T.C. Annual Report, 1960, at 82.

⁴¹ *Ibid.*

⁴² Adopted April 26, 1960.

⁴³ Adopted December 5, 1961.

again and again as advertisers seek, by appeal and other delaying tactics, to extend the time during which they may profit by the dubious practice.

It would be quite impossible, even as a statistical exercise, to give a meaningful survey of all of the Commission's advertising cases. In the fifty-odd volumes of Federal Trade Commission decisions, some seventy percent of the cases are concerned with unfair and deceptive practices, and of this number, a large proportion involve some form of false advertising. Both the working principles of the Commission and the legal criteria of the courts will be adequately considered if analysis focuses principally on appeals which have been carried to the courts.

While it has sought to exercise some critical judgment in the selection of cases to be brought, the Commission has also endeavored to act on all complaints received either from industry or from consumers. Where administrative preference is exercised, the selection may involve considerations of the importance of the commodity or trade involved and the seriousness of the charge with respect to false advertising. The important charges relating to unlawful advertising practices include misrepresentation or deception respecting the content of the product, its quality, quantity, price, place of origin or the commodity's trade name, the use of endorsements or testimonials, misbranding and mislabeling, and simulation of competitors' products. The more important products which are considered worthy of first attention include foods, drugs, cosmetics and health devices (particularly if the item is potentially dangerous or is presented with fraudulent claims), wearing apparel (notably fabrics, furs, and footwear), household furnishings and appliances, building materials, hygienic products (soap, dentifrices, toilet preparations), animal medicinal preparations, correspondence courses (especially with appeals to veterans), automobile repair parts and accessories, optical supplies, agricultural supplies, animal foods, and school supplies. The less important products include such items as hair and scalp preparations, photographs and photographic equipment and supplies, jewelry, gasoline additives, radio and television accessories and repairs, antifreeze preparations, sporting goods, drycleaning fluids, and insecticides and mothproofing chemicals.

The issues have changed and evolved with successive modifications of the legislation under which the Commission works. Until 1938, the Commission was able to attack false advertising only as it came within the scope of "unfair methods of competition" as recognized by the courts. After the Wheeler-Lea amendments, the

Commission has more commonly charged "unfair and deceptive practices," thereby avoiding the necessity as a matter of proof of establishing the scope of competition and showing that competitors or competition have been injured. Even with the more specific statutory prohibitions applicable to foods, drugs, cosmetics and therapeutic devices, or to wools, furs and textiles, the Commission has commonly charged both a violation of the specific statute and a violation of section 5's mandate against "unfair methods of competition and unfair and deceptive practices in commerce." There have also been significant changes in trial practice, in the proofs adduced and in the quantum of evidence introduced as the courts have come to interpret more literally the statutory instruction that "the findings of the Commission as to the facts, if supported by evidence, shall be conclusive," showing more respect for the Commission's expertise in weighing the evidence and drawing conclusions therefrom.⁴⁴

a. *The Varied Design of Advertising Deceptions*

The design of advertising deceptions exhibits changing detail woven to the dictates of a few recurring themes. The legends change to meet the susceptibilities of a new age, but the plot employs a few well-tested rubrics to accomplish the separation of the credulous from his money. The more it changes, the more false advertising is the same—in its appeals to human weaknesses, in its distortion of the flow of trade, in its ultimate destruction of public faith in the merchant and his wares and his advertising. The variations on these ancient themes are examined in representative cases wherein the courts have supported or admonished the Commission.

1. *Business Status or Connection*

Businesses, like individuals, are "status seekers." Jobbers represent themselves as "manufacturers," converters are titled "mills," retailers masquerade as wholesalers, and unknown or little-known distributors borrow the names—and hopefully the reputation—of established and favorably known corporations. The fact that these things are done testifies to the faith of their practitioners that the deceptions, if successful, bring commercial advantage and pay off in larger sales. The objective is always "unfair competition" although the perpetrator may never identify, even to himself, the competitors of whom he seeks to take unfair advantage, and though the product he sells is as serviceable as any other in the market.

⁴⁴ Federal Trade Commission Act § 5(c), 52 Stat. 113 (1938), 15 U.S.C. § 45(c), amending 38 Stat. 719 (1914). See Manco Watch Strap Co., No. 7785, FTC, March 13, 1962.

Commission and courts have agreed that misrepresentation of business status or business connections operates to the prejudice of competitors and of the public and constitutes an unfair method of competition. Also, the courts have recognized that proceedings against such misrepresentations are in the public interest. Referring to a "milling company" which did no grinding of wheat but was engaged in mixing and blending plain and self-rising flours, the Supreme Court observed:

If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin. Here the findings of the Commission, supported by evidence, amply disclose that a large number of buyers, comprising consumers and dealers, believe that the price or quality or both are affected to their advantage by the fact that the article is prepared by the original grinder of the grain. The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might not buy if correctly informed as to its origin. We are of the opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial.⁴⁵

Similarly, the Commission has been upheld in denominating unfair competition the use of the word "mill" by a jobber and wholesaler of upholstering fabrics and supplies⁴⁶ and the use of "manufacturing" in the corporate title of a converter of textiles.⁴⁷

The use of the words "civil service" and "bureau" by a correspondence school was held to be unfair competition in implying a connection with the government.⁴⁸

The inclusion of the words "Army and Navy" in the title of a retailer was ruled unfair where the goods purchased from Army and Navy departments had declined to 10 percent of the total inventory;⁴⁹ and the title "United States Navy Weekly" was ordered discontinued by a publication having no official connection with the United States Navy.⁵⁰ In parallel situations, a supplier of salt blocks for livestock was found to be engaged in false advertising in representing the

⁴⁵ *F.T.C. v. Royal Milling Co.*, 288 U.S. 212, 216-217 (1933). See also *F.T.C. v. Balme*, 23 F.2d 615, 620 (2d Cir. 1928); *F.T.C. v. Winsted Hosiery Co.*, 258 U.S. 483, 492-494 (1922); *Ohio Leather Co. v. F.T.C.*, 45 F.2d 39, 41 (6th Cir. 1930).

⁴⁶ *F.T.C. v. Mid West Mills*, 90 F.2d 723 (7th Cir. 1937).

⁴⁷ *Bear Mill Manufacturing Co. v. F.T.C.*, 98 F.2d 67 (2d Cir. 1938).

⁴⁸ *F.T.C. v. Civil Service Training Bureau*, 79 F.2d 113 (6th Cir. 1935).

⁴⁹ *F.T.C. v. Army and Navy Trading Co.*, 88 F.2d 776 (D.C. Cir. 1937).

⁵⁰ *United States Navy Weekly v. F.T.C.*, 207 F.2d 17 (D.C. Cir. 1953).

product as endorsed by the Quartermaster's Department of the Army.⁵¹ A retailer of jewelry was found to be falsely representing itself as a "wholesaler,"⁵² and a cease and desist against a mail-order seller of farm supplies featuring "factory to consumer" statements in its catalogue was upheld.⁵³

The obvious and usual remedy in such cases is an order requiring the excision of the deceptive word or words, but where such an order would require a revision in a corporate title long in use, the courts have sometimes considered that remedy too harsh. Cases have then been remanded to the Commission with instructions to consider whether requiring proper qualifying words in immediate connection with the corporate names would not guard against misrepresentation.⁵⁴ When the corporate title or trade name of a product involves a seemingly deliberate misuse of a name, the courts have shown little concern to safeguard any values accruing to the offender. Thus, an imitative and confusing use of "Juvenile," along with a design closely resembling the registered trademark of another corporation, brought an order to cease.⁵⁵ The use of the word "lighthouse" in a corporate title was prohibited along with a misrepresentation of the company as "sole distributors of the Chicago Lighthouse."⁵⁶ Passing-off rugs as "Wilton" rugs is an example of the oldest form of misrepresenta-

⁵¹ *Guarantee Veterinary Co. v. F.T.C.*, 285 Fed. 853 (2d Cir. 1922).

⁵² *L. & C. Mayers Co. v. F.T.C.*, 97 F.2d 365 (2d Cir. 1938).

⁵³ *Brown Fence & Wire Co. v. F.T.C.*, 64 F.2d 934 (6th Cir. 1933).

⁵⁴ "Although we sustain the Commission in its findings and conclusions to the effect that the use of the trade names in question and the misstatements referred to constitute unfair methods of competition within the meaning of the act, and that its proceeding was in the interest of the public, we think under the circumstances the Commission went too far in ordering what amounts to a suppression of trade names. These names have been long in use, in one instance beginning as early as 1902. They constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the names." *F.T.C. v. Royal Milling Co.*, *supra* note 45, at 217. See also *F.T.C. v. Mid West Mills*, *supra* note 46; *Bear Mill Manufacturing Co. v. F.T.C.*, *supra* note 47; *Educators Association v. F.T.C.*, 108 F.2d 470 (2d Cir. 1939) and 118 F.2d 562 (2d Cir. 1941). *But see Herzfeld v. F.T.C.*, 140 F.2d 207 (2d Cir. 1944); *Goodman v. F.T.C.*, 244 F.2d 584 (9th Cir. 1957).

⁵⁵ *Juvenile Shoe Co. v. F.T.C.*, 289 Fed. 57 (9th Cir. 1923).

⁵⁶ *Lighthouse Rug Co. v. F.T.C.*, 35 F.2d 163 (7th Cir. 1929). The Company had purchased and resold rugs for the Chicago Lighthouse until October 1926 when it began manufacturing identical rugs with sighted employees and competing with the institution for the blind.

tion.⁵⁷ But a pseudo passing-off may occur with the use of an established name for articles not produced by the well-known manufacturer.⁵⁸ Similarly, the Commission ordered the discontinuance of the use of the name "Remington" for radio receiving sets,⁵⁹ the application of the proper names "Elgin," "Underwood," and "Remington" to a variety of products not manufactured by those established companies,⁶⁰ and "Waltham" for inexpensive pen points.⁶¹ Likewise, the use of the word "Westinghouse" in connection with the advertising of an electric appliance, where the Westinghouse Corporation had furnished only a small component, was held to warrant an order by the Commission.⁶²

2. *The Characteristics of the Product*

Much false advertising is concerned with the qualities of the product—its identity, its contents, its capacity or performance, its source or foreign origin, and the like.

Lumber is a product that is easily misrepresented to the public. The Commission was, therefore, upheld in its order forbidding the use of the designation "Philippine mahogany" for a wood imported from the Philippine Islands which did not belong to the botanical family of mahoganies and which did not have the technical characteristics of true mahogany woods.⁶³ On further consideration in later cases, however, the Commission concluded that the term "Philippine mahogany" had indeed acquired a secondary meaning which permitted its use without inducing unfair competition.⁶⁴ Such was not

⁵⁷ *F.T.C. v. Artloom Corp.*, 69 F.2d 13 (3d Cir. 1934).

⁵⁸ Manufacturers of automotive and metal specialties, including spark plug cable sets, undertook to market their products under the "Champion" designation, without the consent of the Champion Spark Plug Co. *F.T.C. v. Real Products Corp.*, 90 F.2d 617 (2d Cir. 1937).

In a private suit, a manufacturer of the spark plugs used as original equipment in Ford cars was successful in enjoining the sale by a chain store of spark plugs manufactured by another firm and marketed in cartons bearing the legends "standard spark plugs for Fords," "Ford plugs," etc. *S. S. Kresge Co. v. Champion Spark Plug Co.*, 3 F.2d 415 (6th Cir. 1925).

⁵⁹ *Pep Boys—Manny, Moe & Jack v. F.T.C.*, 122 F.2d 158 (3d Cir. 1941).

⁶⁰ *Glater v. F.T.C.*, 186 F.2d 801 (7th Cir. 1951).

⁶¹ *C. Howard Hunt Pen Co. v. F.T.C.*, 197 F.2d 273 (3d Cir. 1952).

⁶² *Niresk Industries v. F.T.C.*, 278 F.2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960).

⁶³ *Indiana Quartered Oak Co. v. F.T.C.*, 26 F.2d 340, 343 (2d Cir. 1928). Although the court affirmed the order, Judge Swan was of the opinion that the word "Philippine mahogany," used in its commercial, as distinguished from its botanical, sense was justifiable, but "in view of the Commission's findings, the court is powerless."

⁶⁴ *Indiana Quartered Oak Co. v. F.T.C.*, 58 F.2d 182 (2d Cir. 1932).

the situation with the use of "California white pine" to designate western yellow pine (*Pinus ponderosa*). There the Supreme Court reversed the lower court to uphold the Commission's original order.⁶⁵

The featuring of ingredients which are present in insufficient quantities to affect the performance of a product has been ruled to be unfair competition in such instances as "Naptha Soap,"⁶⁶ the designation of an analgesic ointment as "Aspirub,"⁶⁷ or the inclusion on a label of the legend "Dr. Caldwell's syrup pepsin combined with laxative senna compound."⁶⁸ The Commission has likewise issued orders against the use of fruit names to describe drinks using artificial fruit flavors.⁶⁹

A label may have the capacity to deceive because it does not fully disclose the nature of the product, where the product, in packaging and appearance, resembles other products. This is the situation with respect to reclaimed and reprocessed motor oils. Even where a producer of such oils has marked his cans plainly "Reprocessed Oil," the Commission has required affirmative disclosure that the oil is re-refined from used motor oil.⁷⁰

Trade names are commonly variant spellings of common names that serve to associate the product in the buyer's mind not only with the seller but also with certain favorable qualities of the product. Such trade names may have a capacity to deceive, and where such is the case, their use may be forbidden as unfair competition or as

⁶⁵ *F.T.C. v. Algoma Lumber Co.*, 291 U.S. 67 (1934), reversing *Algoma Lumber Co. v. F.T.C.*, 64 F.2d 618 (9th Cir. 1933).

⁶⁶ The Commission found that Procter & Gamble's soaps advertised as "P & G, The White Naptha Soap," "Naptha Soap Chips," and "Star Naptha Washing Powder" contained kerosene as the petroleum distillate and that the products contained less than one-half of one percent of naptha, an amount insufficient to be effective as a cleansing ingredient. The court agreed with the Commission that the labeling and advertising constituted unfair competition, but held that since naptha is a volatile product, the Commission's order requiring more than one percent by weight of naptha at the time the soap was sold to the public was impossible of performance "unless an unreasonably large amount of naptha is used in their manufacture." It therefore modified the Commission's order to require the specified amount at the time of manufacture. *Procter & Gamble Co. v. F.T.C.*, 11 F.2d 47 (6th Cir. 1926).

⁶⁷ *Justin Haynes & Co. v. F.T.C.*, 105 F.2d 988 (2d Cir. 1939). The Commission found that the aspirin was present only in negligible amount and that it is not absorbed into the body through the skin.

⁶⁸ *Dr. W. B. Caldwell v. F.T.C.*, 111 F.2d 889 (7th Cir. 1940).

⁶⁹ *F.T.C. v. Morrissey*, 47 F.2d 101 (7th Cir. 1931); *F.T.C. v. Good-Grape Co.*, 45 F.2d 70 (6th Cir. 1930).

⁷⁰ *Royal Oil Corp. v. F.T.C.*, 262 F.2d 741 (4th Cir. 1959). See also *Mohawk Refining Corp. v. F.T.C.*, 263 F.2d 818 (3d Cir. 1959); *Double Eagle Refining Co. v. F.T.C.*, 265 F.2d 246 (10th Cir. 1959), cert. denied, 361 U.S. 818 (1959).

an unfair or deceptive practice. Of "Duraleather," an imitation or artificial leather sold to manufacturers of automobiles, trunks and suit cases, the court, in upholding the Commission's order, remarked:

We are of the opinion that petitioners' trade name . . . "Duraleather" . . . is inherently false; that it has the capacity and tendency to deceive the ultimate purchasers of goods made from the imitation leather marked, advertised, and marketed under such trade name into the belief that such goods are made of genuine leather.⁷¹

But a Commission order directed against using the trade name "Kaffor-Kid" on calfskin leathers was vacated where it appeared that others were using "kid" to describe leather not made from the hides of goats and where there was no evidence that manufacturers purchasing the leather were ever deceived.⁷² And despite the Commission's findings and orders, an advertiser of "White Shellac" and "Orange Shellac" which was not composed solely of genuine shellac gum was allowed to continue with his labels and advertising if the challenged trade names were accompanied by a legend such as "shellac substitute" or "imitation shellac" and a statement that the product is not 100 percent shellac.⁷³

Cigar smokers, however, were protected from deception involved in the application of the word "Havana" to cigars containing no Cuban tobacco, even though some manufactures were using an explanatory phrase "domestic filler—domestic wrapper."⁷⁴ "Sani-Onyx, A Vitreous Marble" was disallowed in the advertising of a product fabricated chiefly from silica,⁷⁵ and "Porcenamel" was found to be misleading for awning products coated with an organic plastic resin rather than porcelain enamel.⁷⁶

An order against misrepresenting cooking utensils was upheld where the utensils bearing the trade name "Silver Seal" and having the appearance of silver or aluminum were represented as being superior to aluminum or granite utensils; such representations could reasonably be understood to indicate that the utensils contained silver which made them superior.⁷⁷ Combs composed of a non-vulcanized

⁷¹ Masland Duraleather Co. v. F.T.C., 34 F.2d 733, 737 (3d Cir. 1929).

⁷² Ohio Leather Co. v. F.T.C., *supra* note 45.

⁷³ F.T.C. v. Cassoff, 38 F.2d 790 (2d Cir. 1930).

⁷⁴ H. N. Heusner & Son v. F.T.C., 106 F.2d 596 (3d Cir. 1939); El Moro Cigar Co. v. F.T.C., 107 F.2d 429 (4th Cir. 1939).

⁷⁵ Marietta Manufacturing Co. v. F.T.C., 50 F.2d 641 (7th Cir. 1931). This was a registered trade name.

⁷⁶ Arrow Metal Products Corp. v. F.T.C., 249 F.2d 83 (3d Cir. 1957).

⁷⁷ Century Metalcraft Corp. v. F.T.C., 112 F.2d 443 (7th Cir. 1940). Since the

product (the composition was 13 percent rubber, 85 percent resin, and 2 percent other ingredients) could not be labeled "rubber," "hard rubber," or after the Commission's order, "rubber-resin."⁷⁸

"Segal Pick-Proof," advertised with the slogan, "The only lock cylinder that it is impossible to pick," was held to be a deceptive trade name when two witnesses demonstrated to the examiner *in camera* their ability to pick the locks.⁷⁹ "Gold Tone Studios, Inc." was ruled an improper name for a company that did not finish its photographs by the gold tone process.⁸⁰

Trade names are often valuable commercial assets, and where possible without continuing a deception, the courts have sought to preserve these values. An overcoat fabric containing a combination of alpaca, mohair, and wool fibers but no vicuna, had been successfully sold for many years under the trade name "Alpacuna." The lower court upheld the Commission's finding that the trade name had the capacity to deceive but expressed regret that it did not have the power to modify the Commission's order which required discontinuance of the name.⁸¹ On review the Supreme Court noted that, while the matter was one initially and primarily for the Commission, the reviewing court did have the power to modify a Commission order. It therefore ordered the case remanded to the Commission for consideration whether "appropriate qualifying words" might not "eliminate any deception lurking in the trade name."⁸² On remand to reconsider the trade name, "Cashmora," accompanied by the legends "30% Angora rabbit—70% lamb's wool" and "No Cashmere" for sweaters containing no cashmere, the Commission found the name still deceptive to a portion of the public and renewed its order.⁸³

A label with its legends may perform the same function as a trade name in keeping consumers loyal to a product. For 60 years prior to September, 1919, "Doctor Price's Cream Baking Powder" had been marketed as a cream of tartar baking powder, extensively advertised as superior in healthfulness to competing baking powders containing phosphate or alum or both. Then the rising price of cream

complaint had not alleged that the use of the trade name "Silver Seal" was deceptive, the company was allowed to continue to use the name.

⁷⁸ *United States v. Vulcanized Rubber & Plastics Co.*, 178 F. Supp. 723 (E.D. Pa. 1959). The Commission won a summary judgment for violation of its order.

⁷⁹ *Segal Lock & Hardware Co. v. F.T.C.*, 142 F.2d 935 (2d Cir. 1944).

⁸⁰ *Gold Tone Studios, Inc. v. F.T.C.*, 183 F.2d 257 (2d Cir. 1950).

⁸¹ *Jacob Siegel Co. v. F.T.C.*, 150 F.2d 751 (3d Cir. 1944).

⁸² 327 U.S. 608 (1946). The Commission modified its order, 43 F.T.C. 256.

⁸³ *Elliott Knitwear v. F.T.C.*, 266 F.2d 787 (2d Cir. 1959); *Elliott Import Corp.*, No. 6637, FTC, Oct. 24, 1961.

of tartar prompted Royal Baking Powder Company to convert to a phosphate baking powder. It continued at first to use the old labels with an overstamp, and then developed new labels so similar in design and phrasing that, in the judgment of the Commission, purchasers were likely to be deceived into believing they were continuing to receive the same product.⁸⁴

"Sectional overlay" is a "quality mark" which indicates that silverware has been reinforced at the points of wear; it is indicative of "additional value and increased use and permanency of the article." To apply the term to all pieces in a silver set where the ornamental pieces are not "sectionally overlaid" is unfair competition.⁸⁵

Trademarks, though registered, have no better standing than trade names when they are used to practice deception.⁸⁶ The registration of a trademark gives "no unlimited sanction to use it when it would deceive";⁸⁷ it "is not a license to engage in unfair competition."⁸⁸ And the trademark, if deceptive, is not saved by calling it simply a "boastful and fanciful word."⁸⁹

⁸⁴ *Royal Baking Powder Co. v. F.T.C.*, 281 Fed. 744 (2d Cir. 1922). In upholding the Commission's order, the court stated, at page 753:

The novelty of the present case lies in the fact that the manufacturer is passing off one of his products for another of his own products, and the basis of this proceeding is the deception of the public. . . .

. . . The method of advertising adopted by the Royal Baking Powder Co. to sell under the name of Dr. Price's Cream Baking Powder an inferior powder, on the strength of the reputation attained through 70 years of its manufacture and sale and wide advertising of its superior powder, under an impression induced by its advertisements that the product purchased was the same in kind and as superior as that which had been so long manufactured by it, was unfair alike to the public and to the competitors in the baking powder business. . . .

⁸⁵ *National Silver Co. v. F.T.C.*, 88 F.2d 425, 427-428 (2d Cir. 1937).

⁸⁶ *F.T.C. v. Kay*, 35 F.2d 160, 162 (7th Cir. 1929): "Assuming that respondent has registered his trade-mark as above indicated, the test of his methods of competition is, not whether a trade-mark may have been registered, but whether his methods fall within the condemnation of the Federal Trade Commission Act, which declares 'unfair methods of competition in commerce are declared unlawful'."

⁸⁷ *N. Fluegelman & Co. v. F.T.C.*, 37 F.2d 59, 61 (2d Cir. 1930).

⁸⁸ *Irwin v. F.T.C.*, 143 F.2d 316, 325 (8th Cir. 1944); *F.T.C. v. Real Products Corp.*, *supra* note 58.

⁸⁹ *Charles of the Ritz v. F.T.C.*, 143 F.2d 676, 679 (2d Cir. 1944):

Next, and as the crux of its appeal, petitioner attacks the propriety of the finding that by use of the trade-mark "Rejuvenescence" it has represented that its preparation will rejuvenate and restore the appearance of youth to the skin. . . . On the contrary, the Commission's expert and practicing dermatologist testified directly that rejuvenescence still meant not only to him, but also, as far as he knew, to his female patients, the restoration of youth. In the light of this plain meaning, petitioner's contention can hardly be sustained that "rejuvenescence" is a nondeceptive "boastful and fanciful word," utilized solely for

Pictures as well as words can be deceptive. However, when a picture used in a trademark showed a cotton mattress with one corner flaired open, so that a 3-to-6 inch mattress would have expanded to 35 inches, the Commission was not allowed the enforcement of a cease and desist order denying the company the right to continue to use the picture in advertising or as a trademark.⁹⁰

The uninhibited use of pictorial misrepresentations has recently been receiving the Commission's critical attention.⁹¹ The "sandpaper test" by which "Palmolive Rapid Shave" cream was demonstrated "to prove Rapid Shave's super moisturizing power" employed not sandpaper but a sheet of plexiglass to which sand had been applied. In announcing its cease and desist order against Colgate-Palmolive Co. and its advertising agency, Ted Bates & Co., the Commission commented on the use of spurious mockups or demonstrations on television:

The limitations of the [television] medium may present a challenge to the creative ingenuity of copywriters; but surely they do not constitute lawful justification for resort to falsehoods and deceptions of the public. The argument to the contrary would seem to be based on the wholly untenable assumption that the primary or dominant function of television is to sell goods, and that the Commission should not make any rulings which would impair the ability of sponsors and agencies to use television with maximum effectiveness as a sales or advertising medium.

Stripped of polite verbiage, the argument boils down to this: Where truth and television salesmanship collide, the former must give way to the latter. This is obviously an indefensible proposition. The notion that a sponsor may take liberties with the truth in its television advertising, while advertising using other media must continue to be truthful, is patent nonsense. The statutory requirements of truth in advertising apply to television no less than to other media of communication.⁹²

False advertising is involved when the source from which a product comes is misrepresented. Corned beef hash and deviled ham

its attractiveness as a trade-mark. That the Patent Office has registered "Rejuvenescence" as a trade-mark is not controlling. Even conceding its non-descriptive quality and hence its validity as a trade-mark—a concession sufficiently doubtful in itself to be made only *arguendo*—the fact of registration does not prevent its use from falling within the prohibition of the Federal Trade Commission Act.

⁹⁰ *Ostermoor & Co. v. F.T.C.*, 16 F.2d 962 (2d Cir. 1927).

⁹¹ *Standard Brands*, No. 7737, FTC, June 1, 1960; *Eversharp*, No. 7811, FTC, Sept. 30, 1960; *Colgate-Palmolive Co.*, No. 7660, FTC, March 9, 1961; *Carter Products*, No. 7943, FTC, Aug. 31, 1961.

⁹² *Colgate-Palmolive Co., Ted Bates & Co.*, F.T.C. No. 7736, FTC, January 4, 1962.

packed from the meat of cattle or hogs not grown in Virginia could not, in the view of the Commission, be sold under the label "Virginia," even though the labels had been approved by the Secretary of Agriculture under the Meat Inspection Act. But where the distributor acquired substantial stock interests in licensed packers, it qualified as a packer under the Packers and Stockyards Act, and the Commission lost jurisdiction to impose an order.⁹³ The use of "New River" in corporate name and trade name by a coal company marketing coal from another region is unfair competition,⁹⁴ and "Scout" cannot be placed on a knife that is not distributed by the Boy Scouts of America.⁹⁵

Attempts to glamorize products by attributing to them a foreign origin is a recurring malpractice among sellers of perfume and other toiletries. Sometimes the deception covers a product of wholly domestic origin;⁹⁶ sometimes the ingredients, or some of them, are imported, but the final product is compounded in this country. There may be no affirmative statement of foreign origin, but the use of foreign words and phrases may nevertheless deceive the public.⁹⁷ It is equally a deceptive practice to fail to disclose the foreign origin of products,⁹⁸ or to imply an untruthful foreign origin.⁹⁹

Outside of the fields of cosmetics and medicinal preparations, there are relatively few court decisions on false advertising that turn on the performance characteristics of the falsely advertised products. An overly optimistic statement of the capacity of a shortwave radio to receive foreign broadcasts brought a cease and desist order,¹⁰⁰ as did exaggerated claims about the success of waterproofing compounds for masonry walls.¹⁰¹ But the court differed with the Commission about the significance of the protection afforded by motor oil containing colloidal graphite when the oil supply in an engine is depleted.¹⁰² However, when books are republished, in this instance

⁹³ *United Corp. v. F.T.C.*, 110 F.2d 473 (4th Cir. 1940). A Working Agreement of June 4, 1954, between the Food and Drug Administration and the Commission provides for avoidance of duplication of activities.

⁹⁴ *F.T.C. v. Walker's New River Mining Co.*, 79 F.2d 457 (4th Cir. 1935).

⁹⁵ *Adolph Kastor & Bros. v. F.T.C.*, 138 F.2d 612 (2d Cir. 1943).

⁹⁶ *F.T.C. v. Balme*, *supra* note 45.

⁹⁷ *Harsam Distributors v. F.T.C.*, 263 F.2d 396 (2d Cir. 1959); *Houbigant, Inc. v. F.T.C.*, 139 F.2d 1019 (2d Cir. 1944); *Establissemments Rigaud v. F.T.C.*, 125 F.2d 590 (2d Cir. 1942); *Fioret Sales Co. v. F.T.C.*, 100 F.2d 358 (2d Cir. 1938).

⁹⁸ *Segal v. F.T.C.*, 142 F.2d 255 (2d Cir. 1944).

⁹⁹ *Edward P. Paul & Co. v. F.T.C.*, 169 F.2d 294 (D.C. Cir. 1948).

¹⁰⁰ *Zenith Radio Corp. v. F.T.C.*, 143 F.2d 29 (7th Cir. 1944).

¹⁰¹ *Concrete Materials Corp. v. F.T.C.*, 189 F.2d 359 (7th Cir. 1951); *Prima Products v. F.T.C.*, 209 F.2d 405 (2d Cir. 1954).

¹⁰² *Kidder Oil Co. v. F.T.C.*, 17 F.2d 892 (7th Cir. 1941).

as paperbacks, they should show the original titles and indicate clearly if they are abridged.¹⁰³

Woolen products were a problem before the Commission had the strong and specific authority of the Wool Products Labeling Act of 1939¹⁰⁴ to support its orders. A Commission order to end unfair competition through labeling and advertising part-wool underwear as "Natural Merino," "Wool," "Natural Wool," and the like was reversed by the lower court, which could not find any injury to competition.¹⁰⁵ The Supreme Court, however, found that the labels were literally false and deceptive to the purchasing public and that this constituted "an unfair method of competition as against manufacturers of all-wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of a fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods."¹⁰⁶

The synthetic textiles have also presented difficulties for consumers unable always to distinguish silk from rayon. The public interest in resolving this confusion was held to justify a Commission order requiring a manufacturer to label rayon products as rayon, "thus preventing distributors from exercising a deception of which the petitioners themselves were not guilty."¹⁰⁷ The larger possibilities of confusion in the multiplication of trade names for man-made textile fibers was responsible for the enactment of the Textile Fiber Products Identification Act,¹⁰⁸ and for the Commission's rules and regulations enforcing the use of generic names, while still permitting nondeceptive trademarks.¹⁰⁹

False advertising with respect to furs has been under double attack: to secure accurate designations of the kinds of fur in advertising and on labels, and to bring some truth into the pricing of fur products. The Fur Products Labeling Act¹¹⁰ strengthened the Com-

¹⁰³ *Bantam Books v. F.T.C.*, 275 F.2d 680 (2d Cir. 1960).

¹⁰⁴ Wool Products Labeling Act of 1939, 54 Stat. 1128 (1940), 15 U.S.C. §§ 68-68j.

¹⁰⁵ *Winsted Hosiery Co. v. F.T.C.*, 272 Fed. 957 (2d Cir. 1921).

¹⁰⁶ *F.T.C. v. Winsted Hosiery Co.*, *supra* note 45, at 493. In a section 5 case, an advertiser was ordered to cease referring to materials as "wool" and "reprocessed wool" unless the materials are as defined in the Wool Products Labeling Act. *Henry Modell & Co.*, 47 F.T.C. 1329 (1951).

¹⁰⁷ *Mary Muffet v. F.T.C.*, 194 F.2d 504, 505 (2d Cir. 1952).

¹⁰⁸ Textile Fiber Products Identification Act, 72 Stat. 1717 (1958), 15 U.S.C. §§ 70-70k.

¹⁰⁹ Textile Fiber Products Identification Act. § 4, 72 Stat. 1719 (1958), 15 U.S.C. § 70b. See *Courtaulds v. Kintner*, 182 F. Supp. 207 (D.D.C. 1960).

¹¹⁰ Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. §§ 69-69j.

mission's mandate to deal with all forms of misrepresentation. The Commission's Rule 44 is directed against any deceptive claims as to values, savings represented by sale prices, and the like. When this authority was challenged, the lower court agreed with the Commission that the law's "intention was to reach all misrepresentations in advertising, including those relating to prices and value,"¹¹¹ but it did not support the Commission in interpreting "invoice" requirements to apply to sales slips at the retail level. In the matter of invoice requirements, the Supreme Court upheld the Commission, noting that "the 'invoice' is the only permanent record of the transaction that the retail purchaser has" and that, as the Commission emphasized, "the invoice may serve as a documentary link connecting the sale of specific fur products back through the retailer's records with advertisements therefor"¹¹²

A special statutory standard defines false advertising of oleo-margarine to include any representation that margarine is a dairy product.¹¹³ The Commission found that advertisements of "Farm Queen" margarine which used such expressions as "churned to delicate, sweet creamy goodness," "country fresh," and "the same day-to-day freshness which characterizes our other dairy products," violated the special statutory standard, and this was upheld upon review.¹¹⁴

3. *Deceptive Pricing*

The first Federal Trade Commission case to reach the courts involved false advertising with respect to prices. Sears Roebuck & Co. advertised that it could sell sugar at "less than wholesale prices" because of its large volume and quick turnover, and that it could sell teas and coffees at lower prices by buying direct and cutting out middlemen's profits. Since the facts were that it was selling sugar as a loss leader and that it purchased most of its teas and all of its coffees from importers and wholesalers in this country, the Commission found that the false advertising constituted unfair competition.¹¹⁵

Fictitious and deceptive pricing is probably the most prevalent form of false advertising. It is perhaps the most serious present threat to public confidence in advertising. It is also serious in its competi-

¹¹¹ *Mandel Brothers v. F.T.C.*, 254 F.2d 18, 21 (7th Cir. 1958). See also *DeGorter v. F.T.C.*, 244 F.2d 270, 282-283 (9th Cir. 1957).

¹¹² *F.T.C. v. Mandel Bros.*, 359 U.S. 385, 390-391 (1959).

¹¹³ Public Law No. 459, 81st Congress, 64 Stat. 21 (1950), added Section 15(a)(2), 15 U.S.C. § 55(a)(2), to the Federal Trade Commission Act.

¹¹⁴ *E. F. Drew & Co. v. F.T.C.*, 235 F.2d 735 (2d Cir. 1956). See also *Reddi-Spred Corp. v. F.T.C.*, 229 F.2d 557 (3d Cir. 1956).

¹¹⁵ *Sears Roebuck & Co. v. F.T.C.*, 258 Fed. 307 (7th Cir. 1919).

tive effects because price is a material consideration in determining what sellers will get the business.

Fictitious pricing takes many forms, but all are intended to persuade the buyer that he has the opportunity to buy at a saving.¹¹⁶ The Guides Against Deceptive Pricing set forth, with illustrative details, the most common forms of false advertising respecting price. Savings claims from established retail prices are justified only if they apply to a specific article, and the saving is a reduction from the usual price of the article in the area or from the advertiser's customary price in the recent regular course of business; any such advertisement must specify which facts apply. Where savings are advertised in relation to similar and comparable products, the advertising must clearly disclose that the savings are claimed on this basis, and the compared products must be of like quality and generally available at the comparative price in the same trade area. "Special sales" should not be advertised unless the advertised prices are in fact reductions as specified from the usual and customary prices. "Factory or wholesale prices" may not be advertised unless the prices available to purchasers are the same as those at which retailers regularly buy.¹¹⁷

"Pre-ticketing" involves deceptive pricing if the price shown exceeds the price at which the article is usually and customarily sold in the trade area. Similarly, advertising or referring to "manufacturer's list price" or "manufacturer's suggested retail price" involves deceptive pricing if the "list prices" are in excess of those usually and customarily received by retailers in the trade area.

Furs, as luxury and high-priced items, have been particularly subject to deceptive pricing.¹¹⁸ Automobiles were so notoriously subject to deceptive prices that special legislation was passed to require price disclosures.¹¹⁹ Before its enactment, automobile dealers in many eastern cities added approximately \$700 to the prices of the popular cars in order to be able to advertise attractive trade-in allowances.

Deceptive pricing may arise with respect to services as well as commodities. The Commission issued cease and desist orders against

¹¹⁶ *Thomas v. F.T.C.*, 116 F.2d 347 (10th Cir. 1940); *International Art Co. v. F.T.C.*, 109 F.2d 393 (7th Cir. 1940); *Chicago Portrait Co. v. F.T.C.*, 4 F.2d 759 (7th Cir. 1924).

¹¹⁷ *Progress Tailoring Co. v. F.T.C.*, 153 F.2d 103 (7th Cir. 1946).

¹¹⁸ See *The Fair v. F.T.C.*, 272 F.2d 609 (7th Cir. 1959); *Mandel Bros. v. F.T.C.*, 254 F.2d 385 (7th Cir. 1958), and *F.T.C. v. Mandel Bros.*, *supra* note 112; *DeGorter v. F.T.C.*, *supra* note 111, at 282-283.

¹¹⁹ Automobile Information Disclosure Act, 72 Stat. 325 (1958), 15 U.S.C. §§ 1231-1233.

both General Motors and Ford in connection with their adoption and advertisement of the "6% Plan" for financing installment sales of automobiles. The plan, initiated by General Motors, involved such competitive advantages that other companies were obliged to adopt the plan. Some, but not all of the advertisements, noted that it was not 6% interest, but simply a convenient multiple to get the unpaid balance on the purchase price of a car. The Commission, noting that this method involved approximately 11½% simple interest per annum on the unpaid balance, found that the plan had a capacity to deceive the public into thinking that it was paying a simple interest charge of 6%.¹²⁰

4. *Bait Advertising*

Bait advertising is a special form of deceptive price advertising. Bait advertising has been defined by the Commission as "an alluring but insincere offer to sell a product." A popular, well-known product is advertised at an extremely low price, but the advertiser then discourages the prospective buyer from considering the advertised item and attempts to switch him to some other product at a higher price, or on some other basis more advantageous to the advertiser. A second form of bait advertising may involve the offer of inferior merchandise as quality merchandise, also at extremely low prices. The advertiser may seek to effect a switch through refusing to show or sell the advertised product, disparaging the item, failing to have the item available in adequate quantities, refusing to make deliveries within a reasonable time, demonstrating a defective item, or by other devices. Or the switch may be attempted after the prospective buyer has paid for the advertised item. The practice, more commonly employed by sellers of household appliances, sewing machines, and hearing aids, has recently been reported by the Commission to have spread to the home-improvement field.¹²¹

5. *Free Goods*

The offer of free goods is a form of price competition, and like other pricing tactics, may involve deceptive practices.¹²² The offer of "free goods" may even involve elements of bait advertising, as when an offer of books "free" is used to obtain leads and when the free

¹²⁰ General Motors Corp. v. F.T.C., 114 F.2d 33 (2d Cir. 1940); Ford Motor Co. v. F.T.C., 120 F.2d 175 (6th Cir. 1941).

¹²¹ Lifetime, Inc. and Youngstown Homes, Inc., No. 7616, FTC, Dec. 8, 1961.

¹²² Progress Tailoring Co. v. F.T.C., *supra* note 117. A Commission order required discontinuance of advertising offering salesmen accepting employment a suit of clothes "free," when the "free" suit was given as part of the compensation for selling a number of suits.

books are given only in return for a signed contract for an extension service which calls for undisclosed future payments.¹²³

The Commission twice investigated the "free" book offers of the Book-of-the-Month Club, and twice closed the investigations without prejudice. Subsequently, on January 14, 1948, the Commission adopted and published in the Federal Register an administrative interpretation covering the use of the word "free" in advertising. It thereafter reopened the Book-of-the-Month case, found that the use of the word "free" was misleading since, if a member failed to buy four books within a year, the Club demanded payment for the "free" book. On appeal, the court reluctantly upheld the Commission's order.¹²⁴

A change in the political complexion of the Commission brought a change in policy with respect to "free" goods.¹²⁵ A new administrative rule was adopted December 3, 1953, permitting the use of the word "free," or words of similar import, in advertising and otherwise, to describe merchandise which is not an unconditional gift but is contingent on compliance with certain conditions, provided the conditions are clearly disclosed and the merchandise is neither increased in price nor reduced in quality or quantity. Thereafter, the Commission and a respondent joined in a motion to vacate a final order which had been enforced by a decree of the Circuit Court of Appeals.¹²⁶

A sharply divided Commission required a paint manufacturer to cease advertising "Every Second Can Free of Extra Cost" where the manufacturer sold only "in units of two" at a price of "\$6.98 a gallon" or "\$2.25 a quart," since no "usual and regular price" had ever been established.¹²⁷

¹²³ Consolidated Book Publishers v. F.T.C., 53 F.2d 942 (7th Cir. 1931). *Accord*, F.T.C. v. Standard Education Society, 86 F.2d 692 (2d Cir. 1936), which reversed in part the order of the Commission, whereupon the order of the Circuit Court of Appeals was reversed in F.T.C. v. Standard Education Society, 302 U.S. 112, 116 (1937):

"The practice of promising free books where no free books were intended to be given, and the practice of deceiving unwary purchasers into the false belief that loose-leaf supplements alone sell for \$69.50, when in reality both books and supplement regularly sell for \$69.50, are practices contrary to decent business standards. To fail to prohibit such evil practices would be to elevate deception in business and to give it the standing and dignity of truth."

¹²⁴ Book-of-the-Month Club v. F.T.C., 202 F.2d 486 (2d Cir. 1953), *affirming* 48 F.T.C. 1297 (1952).

¹²⁵ The issue was considered in Walter J. Black, No. 5571, FTC, September 11, 1953.

¹²⁶ Rosenblum v. F.T.C., 214 F.2d 338 (2d Cir. 1954). The *motion granted per curiam*. The court's previous order, Rosenblum v. F.T.C., 192 F.2d 392 (2d Cir. 1951) *affirming per curiam* 47 F.T.C. 712 (1950); *cert. denied*, 343 U.S. 905 (1952).

¹²⁷ Mary Carter Paint Co., No. 8290, FTC, June 28, 1962.

6. *Guarantees*

Guarantees are a form of price competition that lends itself to misleading advertising. The abuses of this form of advertising are illustrated in the Commission's Guides Against Deceptive Advertising of Guarantees.¹²⁸

The principal deficiencies in guarantee advertising stem from a lack of clarity and precision in stating accurately what the terms of the guarantee are. Any guarantee must clearly disclose the identity of the guarantor, the nature and extent of the guarantee, and the manner in which the guarantee will be fulfilled. If the guarantee involves a pro rata adjustment, say for the unexpired term of the guarantee of a tire or battery, there must be an explanation of how the adjustment will be calculated. "Satisfaction or your money back" means a refund of the full purchase price in the absence of other clearly stated conditions. A "lifetime" guarantee must also identify the "life" that forms the basis for the warranty, and if any conditions are attached, such as a service charge, it must be clearly disclosed.¹²⁹ "Guaranteed never to be undersold" should also state what the guarantor will do if buyers do not realize lowest prices in purchases from him. An advertiser should not represent that a product is guaranteed unless he is both able and willing to perform according to the guarantee. A guarantee must not be used to misrepresent material facts about the product guaranteed; thus "guaranteed for 30 months" should not be used in promoting a battery that is normally expected to last for only 18 months.

7. *Medicinal Advertising*

The Federal Trade Commission's reversal in the matter of a potentially dangerous "obesity cure," through failure to make adequate findings with respect to the competitive effects of false advertising of the remedy,¹³⁰ provided a firm propaganda base for supporting an enlargement of the Commission's powers to deal with false and misleading advertising. With the enactment of the Wheeler-Lea Amendments, the Commission received the strongest statutory authority to cope with deceptive advertising in the food, drug, cosmetic, and therapeutic appliance fields. The need for policing such advertising is particularly acute, for the advertisers have been notoriously unscrupulous in their

¹²⁸ Adopted April 26, 1960.

¹²⁹ *Parker Pen Co. v. F.T.C.*, 159 F.2d 509 (7th Cir. 1946).

¹³⁰ *F.T.C. v. Raladam Co.*, 283 U.S. 643 (1931). In a complaint based on subsequent violations of the same character, the Commission made painstaking findings with respect both to deception and competitive effects and was upheld by the Supreme Court. *F.T.C. v. Raladam Co.*, 316 U.S. 149 (1942).

claims with respect to these products, and the average purchaser is ill equipped to appraise critically claims respecting therapeutic values. The foundation for the exercise of more effective control over this class of advertising lies in the statutory definition of false advertising; namely, advertising "which is misleading in a material respect" or which "fails to reveal facts material" with respect to the advertising representations or the consequences of use.¹³¹

The same statutory provision which defines false advertising also provides a statutory defense where the advertising goes only to members of the medical profession.¹³² This statutory defense is strictly interpreted and is not available when the advertisements reach a lay public.¹³³

The falsities of medicinal advertising are concentrated in unfounded curative claims. Their capacity for continuing deception lies in the fact that the human body has remarkable recuperative powers; most individuals would recover from their minor ailments without any medication at all. Also many, when ill, continue other therapies while taking the "wonder cure," and then on recovery, they tend to credit the product that has made the most extreme claims. The dangers of misleading medical advertising have increased in recent years. While herb remedies and "snake oils" might not have done any good, they also did little harm; such as not true of some of the new and powerful drugs. And as always, there is the danger that self-medication will allow a serious condition to progress beyond control.

In attacking the touting of the remedial virtues of Capon Water¹³⁴ or the offer of a vitamin to assure a "shapely" figure and a restoration

¹³¹ Federal Trade Commission Act § 15(a), 52 Stat. 116 (1938), 15 U.S.C. § 55(a) (1).

¹³² *Ibid.* "No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representations of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug."

¹³³ The defense was denied to an advertiser of a "cancer cure." "Failure to comply with one of these prerequisites, namely, that an advertisement (1) be disseminated only to members of the medical profession, and (2) be accompanied in each instance by truthful disclosure of the formulae showing quantitatively each ingredient of such drug, would have deprived petitioners of the benefit of the protective provision of section 15(a). Here both of the requirements were lacking. . . ." *Koch v. F.T.C.*, 206 F.2d 311, 316-317 (6th Cir. 1953).

¹³⁴ *Capon Water Co. v. F.T.C.*, 107 F.2d 516 (3d Cir. 1939). The mineral water, used externally or internally, was offered as a cure for 52 named diseases, ranging from nephritis to chronic pneumonia and from poison ivy to sterility. The Commission's mild order required the company to restrict its advertising testimonials to those of its own physician experts!

of vigor,¹³⁵ the Commission's action seemed to be primarily concerned with protecting the consumer's pocketbook. On the other hand, the advertising of a Gordon Detoxifier (a rectal irrigator) as a competent treatment for purifying the blood stream, relieving the pains of rheumatism and arthritis, reducing high blood pressure, and treating other ailments,¹³⁶ or presenting odorless garlic tablets as a remedy for high blood pressure,¹³⁷ could result in delay in obtaining competent medical attention in more serious situations.

Dentifrice advertising, with imputed testimonials and cosmetic claims, are largely matters of consumer deception and unfair competition.¹³⁸ Much more serious were claims to cures or competent treatment of cancer, leprosy, infantile paralysis, diabetes, and arthritis made for several products of Koch Laboratories. The court upheld the Commission in rejecting the evidence of "case histories" and the argument that therapeutic claims were matters of opinion made in good faith.¹³⁹ The sufferings of arthritis patients offer a fertile field for deceptive advertising. Imdrin—"Amazing new discovery for rheumatism, arthritis," "Hospital tested, stops swelling, uncorks joints, contains sensational new research discovery"—was found by the Commission to give only limited and temporary relief from pain, the analgesic effect being due to manganese salicylate and acetylsalicylic acid (aspirin).¹⁴⁰ Dolcin Corporation, whose tablets contained 2.8 grains of calcium succinate and 3.7 grains of acetylsalicylic acid (aspirin), was required to stop advertising Dolcin tablets (1) as inexpensive, (2) as safe when taken over long periods of time, (3) as safe when taken by persons adversely affected by aspirin, and (4) as affording relief from the severe aches, pains, and discomforts of arthritis and rheumatism.¹⁴¹

8. *Cosmetic Advertising*

Cosmetics, like medicines, are a profitable field for deceptive

¹³⁵ Associated Laboratories v. F.T.C., 150 F.2d 629 (2d Cir. 1945).

¹³⁶ Irwin v. F.T.C., *supra* note 88.

¹³⁷ Excelsior Laboratory v. F.T.C., 171 F.2d 484 (2d Cir. 1948).

¹³⁸ Bristol-Myers Co. v. F.T.C., 185 F.2d 58 (4th Cir. 1950). The Commission's desist order was directed against two advertising claims: (1) Claims that twice as many dentists personally used Ipana as any other dentifrice and that more dentists recommended Ipana for their patients than any other two dentifrices combined, and (2) claims that Ipana possessed therapeutic and prophylactic qualities when used with massage to impart health to the gums. The first claims rested on the returns of 621 and 461 dentists among 1983 replying to a magazine survey sent to 10,000 dentists; Commission and court held this small sample did not warrant the sweeping claims.

¹³⁹ Koch v. F.T.C., *supra* note 133.

¹⁴⁰ Rhodes Pharmacal Co. v. F.T.C., 208 F.2d 382 (7th Cir. 1953).

¹⁴¹ Dolcin Corp. v. F.T.C., 219 F.2d 742 (D.C. Cir. 1954).

advertising; the consumer has a will to believe, even with respect to the most extreme claims.

"Charles of the Ritz Rejuvenescence Cream"¹⁴² was advertised to contain "a vital organic ingredient" along with "essences and compounds" so that the foundation cream brings to the user's "skin quickly the clear radiance . . . the petal-like quality and texture of youth" because it "*restores natural moisture* necessary for a live, healthy skin"; thus it is "constantly active in keeping your skin clear, radiant, and young looking."¹⁴³ The Commission's order directed against any advertising using the word "rejuvenescence" was affirmed, Judge Clark answering the petitioner's argument of "no deception" with a recognition of the importance of truthful advertising of cosmetics:

There is no merit to petitioner's argument that, since no straight-thinking person could believe that its cream would actually rejuvenate, there could be no deception. Such a view results from a grave misconception of the purposes of the Federal Trade Commission Act. That law was not "made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous," *Florence Mfg. Co. v. J. C. Dowd & Co.*, 2 Cir., 178 Fed. 73, 75; and the "fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced." *Federal Trade Commission v. Standard Education Soc.*, 302 U.S. 112, 116. . . . The important criterion is the net impression which the advertisement is likely to make upon the general populace. . . . And, while the wise and the worldly may well realize the falsity of any representations that the present product can roll back the years, there remains "that vast multitude" of others who, like Ponce de Leon, still seek a perpetual fountain of youth. As the Commission's expert further testified, the average woman, conditioned by talk in magazines and over the radio of "vitamins, hormones, and God knows what," might take "rejuvenescence" to mean that this "is one of the modern miracles" and is "something which would actually cause her youth to be restored." It is for this reason that the Commission may "insist upon the most literal truthfulness" in advertisements, *Moretrench Corp. v. Federal Trade Commission*, 2 Cir., 127 F.2d 792, 795, and should have the discretion, undisturbed by the courts, to insist if it chooses "upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein.'" *General Motors Corp. v. Federal Trade Commission*, 2 Cir., 114 F.2d 33, 36, certiorari denied 312 U.S. 682.¹⁴⁴

¹⁴² The deceptive character of the trade name has already been noted.

¹⁴³ *Charles of the Ritz v. F.T.C.*, 143 F.2d 676, 677-678 (2d Cir. 1944).

¹⁴⁴ *Id.* at 679-680. See also *Belmont Laboratories v. F.T.C.*, 103 F.2d 538 (3d Cir. 1939).

The prevalence of baldness among men has attracted a parade of specialists, recently masquerading as "trichologists" although most lack all medical training, whose advertising, subtle or blatant, promises the prevention or cure of baldness through the use of medical and cosmetic preparations and "clinical" treatments. These broad claims are false and misleading, for they do not disclose that some 90 per cent of the baldness in men is the so-called "male pattern baldness" for which there is no known remedy.

The Commission's recent attacks on this class of advertising have concentrated on requiring disclosure that the advertised products will have no value with respect to the vast preponderance of baldness cases.¹⁴⁵ It is significant that the Commission has been upheld in more broadly drafted orders which forbid the specified forms of misleading advertising not only with respect to the particular product, but also with respect to "any other preparations for use in the treatment of hair and scalp conditions."¹⁴⁶

9. Testimonials

The use of paid testimonials would seem to be an obvious instance of unfair competition, with a clear capacity to deceive the unskeptical. Even a disclosure of the fact that the testimonials are paid would not preclude the possibility of deception; the pretense, by nondisclosure, that they are unpaid makes the testimonial potentially more deceptive to the unsophisticated. The argument that the testimonial is used simply for the attention-getting value of a famous name is no defense of the practice; indeed, it is not factually correct where the testimonial carries the message of the advertiser. There is no more excuse for the use of paid testimonials than any other deceptive practice. The simple fact is that, when the advertiser pays for the good opinion of the testimonial giver, neither the advertiser nor the public can have any confidence in the sincerity of that opinion.

Despite these truisms, the Commission has suffered some setbacks, as when a lower court reasoned that testimonials did not tend to restrain trade.¹⁴⁷ However, the Commission has continued to attack

¹⁴⁵ *Keele Hair & Scalp Specialists v. F.T.C.*, 275 F.2d 18 (5th Cir. 1960); *Voss Hair Experts v. F.T.C.*, 275 F.2d 24 (5th Cir. 1960); *Ward Laboratories v. F.T.C.*, 276 F.2d 952 (2d Cir. 1960), *cert. denied*, 364 U.S. 827 (1960); *Erickson Hair and Scalp Specialists v. F.T.C.*, 272 F.2d 313 (7th Cir. 1959).

¹⁴⁶ *Voss Hair Experts v. F.T.C.*, *supra* note 145; *Erickson Hair and Scalp Specialists v. F.T.C.*, *supra* note 145.

¹⁴⁷ "The Federal Trade Commission Act . . . does not purport to establish a decalogue of good business manners or morals . . . The Commission does not suggest that these testimonials tend to create a monopoly; they do not have a tendency to create an undue restraint of trade. The strongest argument the respondent makes is that

the "improper" use of testimonials such as false claims with respect to baseball gloves and a failure to disclose that manufacturers were paid to include Tide or Dash in their new washing machines, and it found court support in denying the right to advertise the imputed testimonial of "twice as many dentists" recommending a toothpaste.¹⁴⁸

10. *Disparagement of Competing Products*

If paid praise is permitted, paid disparagement—of competitors' products—is not. The question arose in connection with the sale of stainless steel cooking utensils. Steel cooking utensils can not be promoted by representing that the consumption of food prepared in aluminum utensils will cause cancer, stomach trouble, anemia, or that essential minerals and vitamins are lost.¹⁴⁹ However, the Commission was powerless to stop the same disparaging statements about aluminum cooking utensils by the author and publisher of health pamphlets where neither author nor publisher was engaged in the manufacture or sale of cooking utensils.¹⁵⁰

11. *Insurance Advertising*

Insurance contracts are characteristically complex and difficult for the lay reader to understand. Advertising of insurance would therefore present some problems even if there were no competitive inducements to make the policy's protections appear better than they are. Thus, it is not surprising that the Federal Trade Commission has found many instances when it has been necessary to consider insurance advertising.

There is, however, much confusion as to the extent of the Commission's jurisdiction over insurance company activities. The McCarran-Ferguson Insurance Act¹⁵¹ provides that the antitrust acts

failure to state the price paid for the testimonial amounts to deception and misrepresentation concerning the petitioner's product and in that way the petitioner is able to deprive honest manufacturers of a market. . . . But where the unlawful restraint of trade has been ordered to be discontinued it has always appeared that there was some dishonesty in labeling or marketing the goods. . . . In order that the Commission proceed in the public interest, the courts have insisted not only upon a showing that the practice is unfair and disapproved, but also that the public is misled thereby. . . .

"The use of testimonials, which are truthfully stated under the signature of the giver, cannot in any sense be regarded as unfair competition or as involving a tendency to restrain competition unduly, and the Commission was without jurisdiction to interfere." *Northam Warren Corp. v. F.T.C.*, 59 F.2d 196, 198 (2d Cir. 1932).

¹⁴⁸ *A. J. Hollander & Co.*, No. 8197, FTC, Jan. 3, 1962; *Procter & Gamble Co.*, No. 7542, FTC, June 30, 1960; *Bristol-Myers Co. v. F.T.C.*, *supra* note 138.

¹⁴⁹ *Steelco Stainless Steel v. F.T.C.*, 187 F.2d 693 (7th Cir. 1951).

¹⁵⁰ *Scientific Manufacturing Co. v. F.T.C.*, 124 F.2d 640 (3d Cir. 1941).

¹⁵¹ *McCarran Ferguson Insurance Regulation Act*, 59 Stat. 33 (1945), 15 U.S.C. §§ 1011-1015.

"shall be applicable to the business of insurance to the extent that such business is not regulated by State law."¹⁵² This criterion of jurisdiction is a practical guarantee that every exercise of Commission control will be challenged in the courts.

The Commission's attempt to restrain unfair and deceptive advertising practices by out-of-state insurance companies was held to be beyond its jurisdiction since the states were said to have jurisdiction over out-of-state companies doing business within their boundaries.¹⁵³ Insurance companies writing health and accident policies were unsuccessful in challenging findings of deceptive advertising on the ground that the advertising was in accord with the trade practice rules of the Commission and had been approved by certain of the Commission's advisory attorneys. The court noted that the complaint charged not a violation of trade practice rules, but a violation of section 5 of the Federal Trade Commission Act.¹⁵⁴ However, the Supreme Court has concluded that the McCarran-Ferguson Act has withdrawn the Commission's authority to regulate insurance advertising, where that advertising is regulated by the state wherein it is disseminated;¹⁵⁵ but a domiciliary state's laws forbidding unfair and deceptive practices will not oust the Commission's jurisdiction where health insurance is solicited and sold by mail throughout the country.¹⁵⁶

b. *The Advertiser's Defenses*

The defenses advanced by advertisers fall into two classes: those which challenge the manner in which the Commission has discharged its responsibilities, and those which seek to defend the advertiser's conduct. The first class of defenses involves challenges to the Commission's jurisdiction, the adequacy of its findings in view of the statutory standards, or the reasonableness of its order; these matters are reserved for later consideration. The present section is concerned primarily with attempts to justify or exonerate the advertising.

1. *Puffing*

"Puffing," as an expression of an exaggerated opinion about the quality of a product, has always been a feature of salesmanship; in

¹⁵² McCarran Ferguson Insurance Regulation Act § 2(b), 59 Stat. 34 (1945), 15 U.S.C. § 1012.

¹⁵³ American Hospital and Life Ins. Co. v. F.T.C., 243 F.2d 719 (5th Cir. 1957).

¹⁵⁴ American Life & Accident Insurance Co. v. F.T.C., 255 F.2d 289 (8th Cir. 1958); Automobile Owners Safety Ins. Co. v. F.T.C., 255 F.2d 295 (8th Cir. 1958).

¹⁵⁵ F.T.C. v. National Casualty Co., 357 U.S. 560, 561-563 (1958).

¹⁵⁶ F.T.C. v. Travelers Health Ass'n, 362 U.S. 293 (1960), reversing 262 F.2d 241 (8th Cir. 1959).

moderate measures, it is still tolerated.¹⁵⁷ The important distinction between tolerable puffing and misrepresentation was clearly stated in weighing exaggerated claims respecting benefits from the use of an insecticide spray:

Petitioner argues that the benefits set forth in the advertisements beyond those actually derived from use of the spray are merely trader's talk or "puffing," hence excusable. "Puffing" refers, generally, to an expression of opinion not made as a representation of fact. . . . While a seller has some latitude in "puffing" his goods, he is not authorized to misrepresent them or to assign to them benefits or virtues they do not possess.¹⁵⁸

Representations made in the form of exaggerations or superlatives for the purpose of inducing the purchase of products and with the capacity to deceive cannot be excused as "puffing."¹⁵⁹ Such misrepresentations are particularly intolerable when employed in the promotion of drugs and therapeutic devices.¹⁶⁰ There is little security for the advertiser with deceptive copy in the defense of "puffing."

2. Truth

A defense that the advertising challenged is true is usually an argument that the advertising, critically and literally considered, does not state a falsehood. This is not enough. The test of truth in advertising is the total or net impression made on the reader, an average member of the public.¹⁶¹ "Words and sentences may be literally and

¹⁵⁷ Ostermoor & Co. v. F.T.C., 16 F.2d 962 (2d Cir. 1927).

¹⁵⁸ Gulf Oil Corp. v. F.T.C., 150 F.2d 106, 109 (5th Cir. 1945).

¹⁵⁹ Steelco Stainless Steel v. F.T.C., *supra* note 149, at 697-698. See also Goodman v. F.T.C., *supra* note 151, at 609.

¹⁶⁰ Where the Court of Appeals reversed the Commission's order against exaggerated claims for "Cuboid" shoe inserts, the Supreme Court reinstated the Commission's order in a two-sentence per curiam decision. Sewell v. F.T.C., 240 F.2d 228 (9th Cir. 1956), *rev'd*, 353 U.S. 969 (1957).

In Feil v. F.T.C., 285 F.2d 879, 896-897 (9th Cir. 1960), Judge Yankwich quoted, with emphasis, a warning about deceit and puffing:

"The skillful advertiser can mislead the consumer without misstating a single fact. The shrewd use of exaggeration, innuendo, ambiguity and half-truth is more efficacious . . . than factual assertions. Facts are dull and dangerous; exaggerations are vivid, attractive and privileged. . . .

"Any exemption of puffs or opinion is especially serious in the field of drug advertising, which consists in large measure of therapeutic claims." Quoted from Handler, "The Control of False Advertising Under the Wheeler-Lea Act," 6 Law and Contemp. Prob. 91, 99-100 (1939).

¹⁶¹ Positive Products Co. v. F.T.C., 132 F.2d 165, 167 (7th Cir. 1942):

To an educated analytical reader, these and similar statements may not seem to claim anything more than to relieve delayed menstruation. But the buying public does not ordinarily carefully study or weigh each word in an advertise-

technically true and yet be framed in such a setting as to mislead or deceive."¹⁶²

A Reader's Digest article on cigarettes and their nicotine-and-tar-content advertisements reached the conclusion: "The differences between brands are, practically speaking, small, and no single brand is so superior to its competitors as to justify its selection on the ground that it is less harmful." An accompanying table to indicate how small were the differences showed Old Gold as the lowest. This was immediately seized upon by P. Lorillard Co. "to advertise this difference as though it had received a citation for public service," referring to the Reader's Digest as authority for its claims. When challenged, the company defended the truth of its advertisements, "saying that they merely state what had been truthfully stated in the Reader's Digest." The court characterized the company's advertising as "a perversion of the meaning of the Reader's Digest article which does little credit to the Company's advertising department—a perversion which results in the use of the truth in such a way as to cause the reader to believe the exact opposite of what was intended by the writer of the article."¹⁶³

3. *No Prejudice to Public*

The fact that buyers may not be prejudiced economically through deception or false advertising because they are given "equivalent value" has not prevailed as a defense for misleading advertising.

Where the issue is one of unfair competition, Mr. Justice Cardozo disposed of this defense in a case involving the substitution of cheaper western yellow pine for white pine:

We have yet to make it plain that the substitution would be unfair though equivalence were shown. . . . The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. . . . In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. . . . Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightfully named, are diverted to others whose methods are less scrupulous.¹⁶⁴

The public is equally entitled to protection against deception concerning the sources from which it buys. "If consumers or dealers prefer to purchase a given article because it was made by a particular

ment. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.

¹⁶² Bockenstette v. F.T.C., 134 F.2d 369, 371 (10th Cir. 1943).

¹⁶³ P. Lorillard Co. v. F.T.C., 186 F.2d 52, 57 (4th Cir. 1950).

¹⁶⁴ F.T.C. v. Algoma Lumber Co., 291 U.S. 67, 77-78 (1934).

manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally good, but having a different origin."¹⁶⁵

The issue of no prejudice to the public was most sharply presented in recent cases involving the marketing of reclaimed lubricating oil. The record showed "that lubricating oil does not wear out with use; that use does not change the chemical composition of the oil or its molecular structure but merely contaminates it; and that contamination from use as well as additives put into the oil by the prior producer are eliminated by the re-refining process." It was also shown that the producers had no unfair advantage over their competitors, and that the enforcement of disclosure that the product was re-refined from used motor oil would lessen competition. To all of which the court replied: "But the public is entitled to know the facts with respect to the lubricating oil sold by the petitioners being produced from previously used oil and then make its own choice with respect to purchasing such oil or oil produced from virgin crude, even though the choice is predicated at least in part upon ill-founded sentiment, belief, or caprice."¹⁶⁶

4. *No Injury to Private Right*

A defense in terms of no injury to a private right is quite irrelevant where the statute is concerned with the public interest in maintaining fair competition and avoiding deception of buyers. However, substantially this plea was made by Royal Baking Powder Co. in its argument "that no statute or decided case has declared that a manufacturer or trader owes to his competitors the duty of refraining from misrepresentation of the quality or ingredients of his own goods."¹⁶⁷

5. *No Tendency Toward Monopoly*

The use of deceptive advertising is an evil in its own right which the Commission may order eliminated. The Commission's authority is not limited to practices which tend to create monopoly, but includes all deceptive practices which either prejudice fair competition or injure the public.¹⁶⁸

¹⁶⁵ F.T.C. v. Royal Milling Co., 288 U.S. 212, 216 (1933).

¹⁶⁶ Double Eagle Refining Co. v. F.T.C., 265 F.2d 246, 248 (10th Cir. 1959), *cert. denied*, 361 U.S. 818 (1959). See also Royal Oil Corp. v. F.T.C., 262 F.2d 741 (4th Cir. 1959); Mohawk Refining Corp. v. F.T.C., 263 F.2d 818 (3d Cir. 1959).

¹⁶⁷ Royal Baking Powder Co. v. F.T.C., 281 Fed. 744, 750 (2d Cir. 1922).

¹⁶⁸ In Winsted Hosiery Co. v. F.T.C., 272 Fed. 957, 960 (2d Cir. 1921), "There was no combination in restraint of trade nor any attempt to establish a monopoly." But the Supreme Court upheld the Commission's order in F.T.C. v. Winsted Hosiery

6. *No Deceit of the Public*

The defense that no deception is practiced on the public may be based on the assumption that the public is given equivalent value or on the proposition that no member of the public is deceived. It is the second situation to which attention is directed here.

This argument was rejected with respect to false advertisements of skin ointment and soap appearing in medical journals and in circulars enclosed with the product, the court noting that an advertiser may not excuse himself on the theory that the public "should have known or acted more wisely."¹⁶⁹ As Judge Clark so forcefully argued in *Charles of the Ritz v. F. T. C.*, the advertiser cannot defend his exaggerations or falsehoods by arguing that "no straight-thinking person could believe"; the public is made up of "the ignorant, the unthinking and the credulous" as well as the sophisticated, and the law aims to protect the "less experienced."¹⁷⁰ "Advertisements are intended not 'to be carefully dissected with a dictionary at hand, but rather to produce an impression upon' prospective purchasers."¹⁷¹

7. *Early Disclosure*

Is advertising unobjectionable if the first misleading impressions are subsequently corrected? In its advertisements, Carter Products represented that Arrid "safely stops under-arm perspiration . . . instantly stops perspiration one to three days." The findings of the Commission established that Arrid only temporarily interrupts the under-arm flow of perspiration and does not absorb perspiration. Carter Products argued that they never claimed permanent effect and that the directions on the jar advised "Use daily if necessary" and "Use as frequently as you find necessary." The court rejected Carter Products' defense, noting that the prospective buyer reading a newspaper or magazine advertisement or listening to a radio commercial has no notice of what is stated on the package.¹⁷²

Co., 258 U.S. 483 (1922). See also *Consolidated Book Publishers v. F.T.C.*, *supra* note 123.

¹⁶⁹ *Belmont Laboratories v. F.T.C.*, *supra* note 144.

¹⁷⁰ *Charles of the Ritz v. F.T.C.*, *supra* note 143. See also *Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 Fed. 73, 75 (2d Cir. 1910); *F.T.C. v. Standard Education Soc.*, 302 U.S. 112, 116 (1937); *General Motors Corp. v. F.T.C.*, 114 F.2d 33, 36 (2d Cir. 1940); *Ford Motor Co. v. F.T.C.*, 120 F.2d 175, 182 (6th Cir. 1941); *D.D.D. Corp. v. F.T.C.*, 125 F.2d 679, 682 (7th Cir. 1942); *Moretrench Corp. v. F.T.C.*, 127 F.2d 792, 795 (2d Cir. 1942); *Positive Products Co. v. F.T.C.*, *supra* note 161, at 167; *Stanley Laboratories v. F.T.C.*, 138 F.2d 388, 392-393 (9th Cir. 1943).

¹⁷¹ *Positive Products Co. v. F.T.C.*, *supra* note 161; *Newton Tea & Spice Co. v. United States*, 288 Fed. 475, 479 (6th Cir. 1923).

¹⁷² *Carter Products v. F.T.C.*, 186 F.2d 821, 822-824 (7th Cir. 1951).

"The law is violated if the first contact or interview is secured by deception, . . . even though the facts are made known to the buyer before he enters into the contract of purchase."¹⁷³

8. *No Cure Claimed*

It is a not uncommon complaint of advertisers that the enforcement agencies read more into their advertising copy than is literally there; yet that is precisely the meaning that they expect will be conveyed to the general public by the advertisement.

Among the advertising used by Rhodes Pharmacal Co. for Imdrin, "Amazing New Discovery for Rheumatism, Arthritis," the following was representative:

. . . Persons whose cases of suffering have been thought almost hopeless . . . yes, even people who had suffered and hoped for twenty years, were able to live free of pain . . . like happy human beings once again. No other medicine for rheumatism and arthritis thus far discovered by medical science has such an amazing record. . . .¹⁷⁴

But before the Commission and the courts, Rhodes' position, as stated by the court, was quite different:

Petitioners urge that there is no substantial evidence in the record for the Commission's finding that they represented that Imdrin constituted an adequate, effective and reliable treatment for all forms of arthritis and rheumatism. They point out that they never used the word "cure" in their advertisements and assert that their product was offered to the public only as a relief from pain. It is apparent they made an effort to avoid the use of the word "cure" although one radio advertisement stated, "In a moment I'll be back to tell you folks who have been suffering from arthritis, sciatica, rheumatism and neuritis, news about Imdrin . . . the brand-new, safe and reliable way to cure pain that's being prescribed by many doctors to bring quick, pleasant relief from arthritis pain, stiffness, and swelling." Furthermore, in other ads petitioners often included descriptions of situations which to many potential users, might well imply a cure, such as: "Imdrin . . . brings marvelous freedom from pain," and "For them (users of Imdrin) the aching joints and muscles are a thing of the past," which would lead such persons to believe or hope that Imdrin would effect a cure from their previously existing condition. . . . They did not confine themselves to asserting that Imdrin was for relief of pains or aches from rheumatism or arthritis. In several instances the courts have held that a representation that a preparation is to be used "for" a

¹⁷³ *Id.* at 824. See also *F.T.C. v. Standard Education Society*, *supra* note 123; *Progress Tailoring Co. v. F.T.C.*, *supra* note 117; *Book-of-the-Month Club v. F.T.C.*, *supra* note 124.

¹⁷⁴ *Rhodes Pharmacal Co. v. F.T.C.*, 208 F.2d 382, 384 (7th Cir. 1953).

disease is equivalent to labeling it a cure or remedy for such disease.¹⁷⁵

Responsibility for false and misleading advertising may not be avoided by refined and technical distinctions between what is written or said and what the public reads or understands.

9. *Practices of the Trade*

False advertising may not be defended on the ground that it conforms to the mores of the trade. This was the explicit ruling of the Supreme Court in requiring accurate labels for part-wool underwear.¹⁷⁶ The 6% financing plan for automobile sales was misleading although widely used in the industry.¹⁷⁷ A related argument urges that unequal competition or competitive inequities will result from the prohibition of a practice that others are still free to pursue.¹⁷⁸ This is a matter that lies wholly within the discretion of the Commission, and the courts will not accept competitive inequities as a justification for vacating or postponing the effectiveness of a Commission order.¹⁷⁹

10. *No Responsibility for Salesmen's Representations*

The firm that seeks to take advantage of deceptive misrepresentations in selling its product or service cannot escape the consequences by arguing that its salesmen are independent. The principal is bound by the acts of the salesmen employed, if such acts are within the actual or apparent scope of their authority, even when the deceptive acts and practices are unauthorized.¹⁸⁰ Sellers who provide their representatives with deceptive sales materials and instruct them in the use of deceptive tactics are equally guilty of using unfair and deceptive practices.¹⁸¹

¹⁷⁵ *Id.* at 386. See also *Carter Products v. F.T.C.*, 286 F.2d 461, 475 (9th Cir. 1959); *Positive Products Co. v. F.T.C.*, *supra* note 161.

¹⁷⁶ "The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representations has become so well known to the trade that dealers, as distinguished from customers, are no longer deceived." *F.T.C. v. Winsted Hosiery Co.*, 258 U.S. 483 (1922).

¹⁷⁷ *Ford Motor Co. v. F.T.C.*, *supra* note 120, at 182.

¹⁷⁸ *Royal Oil Corp. v. F.T.C.*, *supra* note 166, at 743-744.

¹⁷⁹ *Moog Industries v. F.T.C.*, 355 U.S. 411, 413 (1958).

¹⁸⁰ *Goodman v. F.T.C.*, *supra* note 159; *Consumer Sales Corp. v. F.T.C.*, 198 F.2d 404, 406-407 (2d Cir. 1952); *Parke, Austin & Lipscomb v. F.T.C.*, 142 F.2d 437, 440 (2d Cir. 1944); *International Art Co. v. F.T.C.*, *supra* note 116, at 398.

¹⁸¹ *C. Howard Hunt Pen Co. v. F.T.C.*, 197 F.2d 273, 281 (3d Cir. 1952); *Inter-*

11. *Statements of Opinion in Good Faith*

In an appeal from a Commission order directed against false advertising of various cancer cures, the producers of the drugs argued that "therapeutic value is not a matter of fact but of opinion and that it 'can never be a "material fact" that can be falsely represented within the contemplation of the last sentence of section 15(a)(1).'"¹⁸² While the court was prepared to agree that certain statements set forth in a book and in medical articles could be considered statements of opinion, the situation was quite different when it came to advertisements. In the advertisements, the representations made with respect to the value of the drugs were in positive language, not the language of opinion. "To the lay person the declaration that a drug does or does not have a certain effect is a representation of fact. The statement that a cancer case has been cured is a statement of fact."¹⁸³

The defense of "opinion" and "good faith" can seldom prevail. The fact of misrepresentation does not depend upon the good or bad faith of the advertiser, but upon the impression that the advertisement makes on the public to which it is addressed.¹⁸⁴

12. *Difficulties of Compliance*

The difficulties-of-compliance defense refers to matching the product to the advertising. As such, it is a completely illogical defense. There is always the possibility of matching the advertising, or the label, to the product. Thus, it is difficult to reconcile the court's modification of a Commission order to allow Procter & Gamble Co. to produce "naptha" soap with a one percent naptha content at the time of manufacture when it might not, at time of sale, contain enough naptha to have any cleansing capacity from that ingredient.¹⁸⁵ The court was much less considerate of a pillow manufacturer that urged the difficulties of maintaining trade-rules standards.¹⁸⁶

13. *The Tariff Acts*

The Commission directed importers of imitation pearls to cease marketing them without clearly disclosing the country of origin. The

national Art Co. v. F.T.C., *supra* note 116; F.T.C. v. Winsted Hosiery Co., *supra* note 176, at 494.

¹⁸² Koch v. F.T.C., *supra* note 133, at 317. See also De Forest's Training, Inc. v. F.T.C., 134 F.2d 819, 821 (7th Cir. 1943).

¹⁸³ Koch v. F.T.C., *supra* note 133, at 318.

¹⁸⁴ *Id.* at 317, 319.

¹⁸⁵ Procter & Gamble Co. v. F.T.C., 11 F.2d 47 (6th Cir. 1926).

¹⁸⁶ "The fact that petitioners may have to regulate their mechanical separating machines so as to attempt to produce the feather and down content specified in the labels, instead of aiming at that amount less the 15% tolerance, is not a denial of due process." Buchwalter v. F.T.C., 235 F.2d 344, 346 (2d Cir. 1956).

importers sought to avoid the Commission's jurisdiction by urging that they were complying with the Tariff Act of 1938. The court found this no excuse.¹⁸⁷

14. *Statements in Patent Claims*

Vacudex, a device to be attached to automobile exhausts, was advertised as saving gasoline and oil, increasing the power of the motor, and giving better engine performance. A Commission order denying the continued use of these claims was appealed. It was argued that the challenged statements were part of the patent application, and that the Commission's order was an attack on the patent system. The majority of the court held that, as the patent did not cover the functions of the invention, the Commission's order was not an attack on the validity of a patent; the order was affirmed.¹⁸⁸

If patent claims or statements in patent applications could grant immunity with respect to the use of those claims in advertising the product, there would be a new and most urgent reason for writing patent applications in broadest terms.

15. *Food and Drug Act Jurisdiction*

In a proceeding involving the labeling and advertising of fruit preserves, the allegations, except with respect to advertising, were established. Thereupon the company argued that since the definition of false advertising in section 15(a) excludes labeling, there could be no violation of the Federal Trade Commission Act. This defense was rejected by the court, for the Commission had found the company to be engaged in unfair methods of competition in violation of section 5 of the act.¹⁸⁹ The jurisdiction of the Commission to prevent unfair competition and deceptive practices by false labeling and misbranding are thoroughly established with respect to all kinds of products.¹⁹⁰

16. *Abandonment of Practices*

The discontinuance of false advertising or other unlawful practices does not necessarily preclude the issuance of a cease and desist

¹⁸⁷ "Our examination of the amended tariff act discloses no language expressing an intention on the part of Congress to repeal section 5 of the Federal Trade Commission Act, or to diminish the authority or the power of the Commission to prevent deceptive trade practices . . ." *L. Heller & Son v. F.T.C.*, 191 F.2d 954, 956 (7th Cir. 1951).

¹⁸⁸ *Decker v. F.T.C.*, 176 F.2d 461 (D.C. Cir. 1949).

¹⁸⁹ *Fresh Grown Preserve Corp. v. F.T.C.*, 125 F.2d 917, 919 (2d Cir. 1942).

¹⁹⁰ *Parfums Corday v. F.T.C.*, 120 F.2d 808 (2d Cir. 1941); *Justin Haynes & Co. v. F.T.C.*, 105 F.2d 988 (2d Cir. 1939); *Fioret Sales Co. v. F.T.C.*, 100 F.2d 358 (2d Cir. 1938); *F.T.C. v. Morissey*, 47 F.2d 101 (7th Cir. 1931); *F.T.C. v. Good-Grape Co.*, 45 F.2d 70 (6th Cir. 1930); *Royal Baking Powder Co. v. F.T.C.*, *supra* note 167; *F.T.C. v. Winsted Hosiery Co.*, *supra* note 176.

order by the Commission.¹⁹¹ While it had been said that the Commission may not issue a cease and desist order as to practices long discontinued and as to which there is no reason to expect their renewal,¹⁹² the Commission has a broad discretion to determine whether a cease and desist order is required.¹⁹³ Where the deceptive advertising was discontinued after the Commission had instituted a general investigation into the advertising practices of health and accident insurance companies, the circumstances were held to warrant the issuance of an order.¹⁹⁴

17. *A Prior Stipulation*

A prior stipulation is no bar to the issuance of a complaint where the advertiser entering into the stipulation stated that if any competitor resumed the objectionable practices, the advertiser would feel free to do likewise.¹⁹⁵ A stipulation is, of course, no bar to subsequent proceedings against subsequent violations of the statutes.¹⁹⁶

18. *Res Judicata*

Res judicata can seldom be a successful defense in any matter before the Commission. The Commission has noted that "the doctrine of finality ordinarily applicable to judicial proceedings is not applicable to Commission proceedings," for "no order . . . can prejudice the statutory right and duty of the Commission to initiate any future action . . . required by changes of fact or law or by the public interest."¹⁹⁷ Nevertheless, the Commission and the Food and Drug Administration have each found prior actions of the other agency an impediment to proceeding against the same respondent on related issues and facts.¹⁹⁸

THE COURTS AND ADVERTISING

While the preceding analysis has been concerned largely with decisions of the courts in advertising cases arising on appeal from the

¹⁹¹ *Fairyfoot Products Co. v. F.T.C.*, 80 F.2d 684 (7th Cir. 1935). See also *Philip R. Park v. F.T.C.*, 136 F.2d 428 (9th Cir. 1943); *Galter v. F.T.C.*, 186 F.2d 810 (7th Cir. 1951).

¹⁹² *F.T.C. v. Civil Service Training Bureau*, 79 F.2d 113, 116 (6th Cir. 1935).

¹⁹³ *Marlene's v. F.T.C.*, 216 F.2d 556, 559-560 (7th Cir. 1954).

¹⁹⁴ *Automobile Owners Safety Ins. Co. v. F.T.C.*, *supra* note 154, at 197-198.

¹⁹⁵ *Fairyfoot Products Co. v. F.T.C.*, *supra* note 191. See also *Stanley Laboratories v. F.T.C.*, *supra* note 170.

¹⁹⁶ *Rock v. F.T.C.*, 117 F.2d 680 (7th Cir. 1941); *Bond Stores*, No. 6789, FTC, Jan. 7, 1960.

¹⁹⁷ *Manco Watch Strap Co.*, No. 7785, FTC, March 13, 1962. See also *F.T.C. v. Raladam Co.*, 316 U.S. 149 (1942).

¹⁹⁸ *George H. Lee Co. v. F.T.C.*, 113 F.2d 583 (8th Cir. 1940); *United States v. Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944).

Federal Trade Commission, the questions considered have not been central to the judicial issues with which the courts are primarily concerned. These essentially judicial questions fall into two classes: the judicial interpretation of the statutory standards for the regulation of advertising, and the judicial enforcement of the Commission's authority—affirming, modifying or denying its orders, punishing violations of Commission orders, and granting injunctions.

1. *Judicial Interpretations of Statutory Standards*

The role of the courts in reviewing the findings and orders of the Federal Trade Commission are specified in the Act. "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."¹⁹⁹ The appellate courts have exclusive jurisdiction to entertain appeals from the orders of the Commission on the basis of "a transcript of the entire record . . . including all the evidence taken and the report and order of the Commission." If the taking of additional evidence becomes necessary, the additional evidence is taken before the Commission, which may make new findings and recommend any appropriate modification of its order.

In reviewing the decisions and orders of the Commission, the courts of appeal seek to establish that the Commission's determinations are supported by substantial evidence "on the record considered as a whole." The courts must give due consideration to whatever the record contains which detracts from the weight of the evidence supporting the Commission's decision. The courts may not substitute their own findings for those of the Commission; they "cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission."²⁰⁰ The Supreme Court has emphasized, in respect to the work of the National Labor Relations Board, that the responsibility of the courts to canvass the whole record to ascertain if there is substantial support for the administrative agency's decision is not "intended to negative the function of the Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."²⁰¹

Similarly, the decisions of the courts of appeals will not be disturbed by the Supreme Court when these decisions are confined to a

¹⁹⁹ Federal Trade Commission Act § 5(c), 52 Stat. 113 (1938), 15 U.S.C. § 45(c), amending 38 Stat. 719 (1914).

²⁰⁰ F.T.C. v. Standard Education Society, 302 U.S. 112, 117 (1937).

²⁰¹ Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 490 (1951).

fair assessment of the record on the sole issue of substantial support, even though the Supreme Court might find the record tilting either way on that issue.²⁰² Because it has the "authority of an expertness" in its field, the Commission's determinations with respect to the weight to be given to the facts and the inferences to be drawn from them are also entitled to the respect of the courts.²⁰³ The Commission's determination in the presence of conflicting evidence is likewise final, "even though the evidence is so conflicting that it might have supported the contrary had such findings been made."²⁰⁴ When, however, the lower courts fail to heed the statutory instruction that the Commission's findings, "if supported by testimony," are conclusive, Supreme Court admonishment may be expected, as in the *Algoma Lumber Co.* case:

. . . [T]he Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the findings of unfair competition had no support whatever. In fact, what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision . . . forbid that exercise of power.²⁰⁵

The Commission is presumed to have expert experience in dealing with unfair competition and deceptive practices generally, and with false and misleading advertising specifically,²⁰⁶ and it may draw upon its experience in order to determine, even in the absence of consumer testimony, the natural and probable result of specific advertising.²⁰⁷

The district courts have no jurisdiction to enter a declaratory

²⁰² *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

²⁰³ "The Circuit Court of Appeals held that the stipulated facts do not sustain the Commission's finding that the use of association prices by members outside the State where they are located has a tendency to lessen competition and to fix uniform prices in such territories. The validity of the inference or conclusion drawn by the Commission and of this part of the order depends upon the proper estimation of the facts stipulated. The language specifically relating to such use of the agreed prices if considered alone might possibly be deemed insufficient. But the Commission is not confined to so narrow a view of the case. That part of the stipulation properly may be taken with all the admitted facts and the inferences legitimately to be drawn from them." *F.T.C. v. Pacific States Paper Trade Ass'n*, 273 U.S. 52, 61 (1927).

²⁰⁴ *Standard Distributors v. F.T.C.*, 211 F.2d 7, 12 (2d Cir. 1954).

²⁰⁵ *F.T.C. v. Algoma Lumber Co.*, *supra* note 164, at 73.

²⁰⁶ *F.T.C. v. R. F. Keppel & Bros.*, 291 U.S. 304, 314 (1934).

²⁰⁷ *E. F. Drew & Co. v. F.T.C.*, 235 F.2d 735, 741 (2d Cir. 1956); *DeGorter v. F.T.C.*, 244 F.2d 270, 283 (9th Cir. 1957); *Carter Products v. F.T.C.*, 268 F.2d 461, 493-495 (9th Cir. 1959).

judgment as to the limits of the Commission's authority to control advertising and labels.²⁰⁸

a. *Competition in Commerce*

The jurisdiction of the Federal Trade Commission with respect to "commerce" has not been fully litigated. Section 5 refers to methods of competition *in commerce*, and "commerce" is specifically defined as interstate and foreign commerce or commerce within a territory or the District of Columbia. Clearly the Commission's authority has not yet been recognized as having the reach of that of the Interstate Commerce Commission to all matters affecting interstate commerce, but this may be because the proper questions, adequately supported by economic facts, have not been presented to the courts. The Federal Trade Commission has been more reluctant than, say, the Interstate Commerce Commission, in dealing with matters which indirectly affect interstate and foreign commerce; it has been held back by its own restrained interpretation of "in commerce."

The Commission, having issued orders against 120 firms engaged in selling assortments of candy in interstate commerce, issued a similar order against Bunte Brothers, an Illinois manufacturer supplying "break and take" candy packages to the Illinois market. The majority of the Supreme Court, Mr. Justice Frankfurter speaking, found this an unwarranted extension of the Commission's power to deal with "unfair methods of competition in commerce."²⁰⁹ Mr. Justice Frankfurter found important distinctions between the problems presented to the Interstate Commerce Commission and those confronting the Federal Trade Commission. But Mr. Justice Douglas, dissenting, found that "the evil here is direct, injurious discrimination against interstate commerce," and argued, "the Act, an exercise by Congress of its commerce power, should be interpreted to protect interstate commerce not to permit discrimination against it."²¹⁰ His logic, stated in syllogistic form, was simple:

Unfair competition involves not only an offender but also a victim. Here some of the victims of the unfair methods of competition are engaged in interstate commerce. The fact that the acts of the offender are intrastate is immaterial. The purpose of the Act is to protect interstate commerce against specified types of injury. So far

²⁰⁸ *Miles Laboratories v. F.T.C.*, 140 F.2d 683 (D.C. Cir. 1944).

²⁰⁹ "The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law." *F.T.C. v. Bunte Bros.*, 312 U.S. 349, 354 (1941).

²¹⁰ *Id.* at 357. He was joined in dissent by Justices Black and Reed.

as the jurisdiction of the Commission is concerned, it is the existence of that injury to interstate commerce not the inter-state or intra-state character of the conduct causing the injury which is important. An unfair method of competition is "in" interstate commerce not only when it has an interstate origin but also when it has a direct interstate impact. Respondent is "using" unfair methods of competition "in" interstate commerce when the direct effect of its conduct is to burden, stifle, or impair that commerce.²¹¹

The fundamental "criterion for exercise of the Congressional power to regulate interstate commerce is the effect of an act upon it and not its source,"²¹² and the Commission should test more fully the scope of "in commerce." If our antitrust laws are to be adequate to their task in preserving a free economy, the Commission would be well advised to act on Mr. Justice Douglas' theory of commerce and provide the courts with specific opportunities to reconsider whether the laws of commerce cannot be brought into harmony with the economics of competition.

The use of advertising is a recognized and integral part of the production and distribution of goods in interstate commerce, and as such it is subject to the regulatory powers of the Commission even though the advertising itself is not in interstate commerce.²¹³ Moreover, it is not necessary that there be any sales in interstate commerce to give the Commission jurisdiction over false advertising.²¹⁴

The Commission may prohibit false advertising of correspondence school courses in Latin American countries by American enterprises, since such competition affects other American firms seeking to serve the same market.²¹⁵ The Commission may not reach unfair or deceptive acts unless "the unfair acts of traders" are "in the affected commerce."²¹⁶

²¹¹ *Id.* at 356.

²¹² *DeGorter v. F.T.C.*, *supra* note 207, at 273-274.

²¹³ *Ford Motor Co. v. F.T.C.*, 120 F.2d 175, 183 (6th Cir. 1941), *cert. denied*, 314 U.S. 668 (1941).

²¹⁴ Section 12 makes it unlawful to disseminate any false advertisement either by the United States mails or in commerce. 52 Stat. 114 (1938), 15 U.S.C. § 52. See *Shafe v. F.T.C.*, 256 F.2d 661, 663-664 (6th Cir. 1958).

²¹⁵ ". . . It is true that much of the objectionable activity occurred in Latin America; however, it was conceived, initiated, concocted, and launched on its way in the United States. That the persons deceived were all in Latin America is of no consequence. It is the location of the petitioner's competitors which counts." *Branch v. F.T.C.*, 141 F.2d 31, 34-35 (7th Cir. 1944).

²¹⁶ Thus the Commission was unable to prohibit the continued dissemination of disparaging statements about the use of aluminum cooking utensils by an author and publisher who were not engaged in the manufacture or sale of cooking utensils. *Scientific Manufacturing Co. v. F.T.C.*, *supra* note 150, at 643-44.

b. *Substantial Evidence*

In all Commission proceedings it has been the rule from the beginning that the Commission has the burden of proof and the Commission has been consistently required, by the courts as well as by its own rules, to rest its findings and orders on substantial evidence. This standard is clearly, but indirectly, indicated by the provision for judicial review of the Commission's orders, wherein it is provided that "the findings of the Commission as to the facts, if supported by evidence, shall be conclusive."²¹⁷ Whether the evidence in any particular proceeding is sufficient is "a question of fact primarily for the Commission to decide from the entire record."²¹⁸ But this determination is always subject to court review.

As previously discussed, the courts defer to the Commission if its findings are supported by substantial evidence, even if the court might reach a different conclusion.²¹⁹ In the matter of false advertising, the Commission is not required to depend upon formal testimony to establish the capacity of a misleading advertisement to deceive; it may draw upon its experience and common sense to determine that fact.²²⁰ The Commission (or its hearing examiner) has the responsibility for passing upon the credibility of witnesses, determining the weight to be accorded to their testimony, and resolving conflicts of evidence.²²¹ In considering false advertising of foods, drugs, cosmetics,

²¹⁷ Federal Trade Commission Act § 5(c), 52 Stat. 113 (1938), 15 U.S.C. § 45(c), amending 38 Stat. 719 (1914). The Administrative Procedures Act provides in section 7(c) that "the proponent of a rule or order shall have the burden of proof," and that no "order [shall] be issued except upon consideration of the whole record . . . and in accordance with the reliable, probative, and substantial evidence."

²¹⁸ *Carter Products v. F.T.C.*, *supra* note 207, at 487.

²¹⁹ "Even assuming that some of the testimony on behalf of the Commission was prejudiced or biased as contended, if the Commission wished to rely upon such testimony, we may not intervene whatever our thought." *Jacob Siegel Co. v. F.T.C.*, 150 F.2d 751, 754 (3d Cir. 1944). This appears to be an overstatement of the deference rule. See also *Vacu-Matic Carburetor Co. v. F.T.C.*, 157 F.2d 711 (7th Cir. 1946).

²²⁰ "The Commission is not required to sample public opinion to determine what the petitioner was representing to the public. The Commission had a right to look at the advertisements in question, consider the relevant evidence in the record that would aid it in interpreting the advertisements, and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive, as charged in the complaint." *Zenith Radio Corp. v. F.T.C.*, 143 F.2d 29, 31 (7th Cir. 1944). See also *Royal Oil Corp. v. F.T.C.*, 262 F.2d 741, 745 (4th Cir. 1959); *New American Library of World Literature v. F.T.C.*, 213 F.2d 143 (2d Cir. 1954); *Hillman Periodicals v. F.T.C.*, 174 F.2d 122 (2d Cir. 1949).

²²¹ "The possibility of drawing either of two inconsistent inferences from the evidence does not prevent the Commission from drawing one of them." *Carter Products v. F.T.C.*, *supra* note 207, at 491.

and therapeutic devices, the Commission may rely upon the opinion of experts testifying on the basis of their general medical and pharmacological knowledge, even though these experts have had no clinical experience with the specific product. Such evidence constitutes "substantial evidence" even in the presence of conflicts of opinion.²²²

Despite the rule respecting "findings of facts supported by substantial evidence," there are situations, some of them surprising, where the lower courts have rejected the Commission's findings or conclusions: the identity of a breed of hogs,²²³ the significance of trade names applied to soaps,²²⁴ the interpretation of the meaning of trade practice rules respecting the contents of down pillows,²²⁵ and the protection afforded by a colloidal graphite motor oil under conditions when the oil supply was depleted.²²⁶ The Commission's orders have been vacated when the court was unimpressed with the pictorial exaggeration of the thickness of a mattress.²²⁷ One court saw no need for an order requiring furniture manufacturers to label their furniture as "veneered," when "all furniture of the better quality has its flat surfaces constructed of ply wood, or laminated and veneered woods" and "only the cheaper and poorer grades of less valuable material are constructed of solid woods."²²⁸ Another court vacated a Commission order restraining a manufacturer of automobile mufflers from advertising that his continuous-electric-welded seams would prevent rusting and that other constructions of mufflers resulted in greater danger of carbon monoxide poisoning.²²⁹ An order running against the advertising of a weight-reducing candy was vacated because the court judged that eating candy before meals would result in reducing weight with no restriction of diet since the candy would automatically restrain the desire for food.²³⁰ However, after a court concluded that "Cashmora,"

²²² *Erickson Hair and Scalp Specialists v. F.T.C.*, 272 F.2d 313, 321-22 (7th Cir. 1959); *Bristol-Myers Co. v. F.T.C.*, 185 F.2d 58, 61-62 (4th Cir. 1950); *Fulton v. F.T.C.*, 130 F.2d 85 (9th Cir. 1942); *Alberty v. F.T.C.*, 118 F.2d 669, 670 (9th Cir. 1941); *Neff v. F.T.C.*, 117 F.2d 495, 497 (4th Cir. 1941); *Dr. W. B. Caldwell v. F.T.C.*, 111 F.2d 889, 891 (7th Cir. 1940); *Justin Haynes & Co. v. F.T.C.*, *supra* note 190.

²²³ *L. B. Silver Co. v. F.T.C.*, 289 Fed. 985 (6th Cir. 1923).

²²⁴ *Allen B. Wrisley v. F.T.C.*, 188 F.2d 437 (7th Cir. 1940).

²²⁵ *Burton-Dixie Corp. v. F.T.C.*, 240 F.2d 166 (7th Cir. 1957); *Lazar v. F.T.C.*, 240 F.2d 176 (7th Cir. 1957).

²²⁶ *Kidder Oil Co. v. F.T.C.*, 117 F.2d 892 (7th Cir. 1941).

²²⁷ *Ostermoor & Co. v. F.T.C.*, 16 F.2d 962 (2d Cir. 1927).

²²⁸ *Berkeley & Gay Furniture Co. v. F.T.C.*, 42 F.2d 427, 429 (6th Cir. 1930). If the better grades of furniture are veneered, what is the objection to so designating them?

²²⁹ *International Parts Corp. v. F.T.C.*, 133 F.2d 883 (7th Cir. 1943).

²³⁰ *Carlay Co. v. F.T.C.*, 153 F.2d 493 (7th Cir. 1949).

with fiber content disclosed, was not deceptive, the Commission on remand found the label deceptive and required that it be discontinued for garments not containing substantial, and disclosed, amounts of cashmere.²³¹

c. *Unfair Competition*

While it forbids unfair methods of competition and deceptive practices in commerce, the act defines neither term. The first judgment as to what constitutes unfair competition or a deceptive practice is the Commission's responsibility. This responsibility is satisfactorily discharged only when the Commission develops an adequate record that establishes why the practice is unfair or deceptive, particularly in terms of its probable consequences.

What makes a business practice unfair or deceptive has been said to be a "matter of law" ultimately to be determined by the courts. The early views that related unfair methods of competition to restraints of trade and tendency toward monopoly were soon abandoned, not merely where false and deceptive practices resulted in unfair competition to other competitors but also where deception of the public was the evil.²³² False advertising, misbranding, and other practices which deceive the public are recognized as injuring competitors who do not use them. But the presence of competitors must be shown, and the unfair competitive effects—diversion of trade, damage or injury to a competitor—should appear or be clearly inferable from the circumstances.²³³ While the act is not concerned with isolated events, "unfair methods" may be shown by two advertisements for a single sale or by the issuance of three old motion pictures with new titles.²³⁴

d. *Deceptive Practices and False Advertising*

The courts have been strongly inclined to defer to the Commission with respect to what advertising is false and misleading and what practices are deceptive. Both the meaning and the falsity of advertising representations are said to present questions of fact to be determined by the Commission, and this finding of fact must be accepted by the

²³¹ *Elliott Knitwear v. F.T.C.*, 266 F.2d 787 (2d Cir. 1959); *Elliott Import Corp.*, No. 6637, FTC, Oct. 24, 1961.

²³² *Consolidated Book Publishers v. F.T.C.*, 53 F.2d 942 (7th Cir. 1931); *Berkeley & Gay Furniture Co. v. F.T.C.*, *supra* note 228; *Masland Duraleather Co. v. F.T.C.*, 34 F.2d 733 (3d Cir. 1929); *Procter & Gamble Co. v. F.T.C.*, 11 F.2d 47 (6th Cir. 1926); *L. B. Silver Co. v. F.T.C.*, *supra* note 223; *Royal Baking Powder Co. v. F.T.C.*, 281 Fed. 744 (2d Cir. 1922); *F.T.C. v. Winsted Hosiery Co.*, 258 U.S. 483 (1922).

²³³ *F.T.C. v. Raladam Co.*, 283 U.S. 643 (1931). See also *Allen B. Wirsley v. F.T.C.*, 118 F.2d 437, 441 (7th Cir. 1940).

²³⁴ *Gimbel Bros. v. F.T.C.*, 116 F.2d 578 (2d Cir. 1941); *Fox Film Corp. v. F.T.C.*, 296 Fed. 358 (2d Cir. 1924).

courts unless "arbitrary or clearly wrong."²³⁵ Indeed, the Commission may determine from an examination of the advertisement, relying on its own judgment and experience, whether the advertisement is false or deceptive.²³⁶

The false advertising or deceptive acts need not be such as would constitute fraud;²³⁷ nor need intent to deceive be shown.²³⁸

Actual deception of the public need not be shown to support a finding of false advertising.²³⁹ The test of falsity is whether the advertising has a natural tendency and capacity to deceive.²⁴⁰ This is to be determined by considering the total impression of the advertisement, not by critical dissection of each sentence.²⁴¹

e. *Public Interest Test in Advertising*

The public interest is a prerequisite to the assumption of jurisdiction by the Commission rather than a test of propriety of issuing a cease and desist order.²⁴² As a practical question, the court is concerned only with whether the matter is too trivial to justify the Commission's attention.²⁴³ Many factors may demonstrate the public interest in false advertising: the substantial volume of the advertiser's business,²⁴⁴ the presence or absence of a probability of deception of the public,²⁴⁵ a threat to the health of the public,²⁴⁶ a diversion of busi-

²³⁵ *Carter Products v. F.T.C.*, *supra* note 207, at 496. See also *Gulf Oil Corp. v. F.T.C.*, 150 F.2d 106, 108 (5th Cir. 1945).

²³⁶ *Zenith Radio Corp. v. F.T.C.*, *supra* note 220.

²³⁷ *D.D.D. Corp. v. F.T.C.*, 125 F.2d 679, 682 (7th Cir. 1942).

²³⁸ *Indiana Quartered Oak Co. v. F.T.C.*, 26 F.2d 340, 342 (2d Cir. 1938); *F.T.C. v. Balme*, 23 F.2d 615, 621 (2d Cir. 1928).

²³⁹ *F.T.C. v. Raladam Co.*, *supra* note 197, at 152; *F.T.C. v. Winsted Hosiery Co.*, *supra* note 232, at 494; *Brown Fence & Wire Co. v. F.T.C.*, 64 F.2d 934, 936 (6th Cir. 1933); *F.T.C. v. Balme*, *supra* note 238, at 620; *Herzfeld v. F.T.C.*, 140 F.2d 207, 208 (2d Cir. 1944); *Bockenstette v. F.T.C.*, 134 F.2d 369, 371 (10th Cir. 1943).

²⁴⁰ *F.T.C. v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *American Life & Accident Insurance Co.*, 255 F.2d 289, 293 (8th Cir. 1958); *Jacob Siegel Co. v. F.T.C.*, *supra* note 219, at 755; *F.T.C. v. Balme*, *supra* note 238, at 620; *Indiana Quartered Oak Co. v. F.T.C.*, *supra* note 238, at 342.

²⁴¹ *F.T.C. v. Standard Education Society*, *supra* note 200, at 116; *Ford Motor Co. v. F.T.C.*, *supra* note 213, at 182; *F.T.C. v. Balme*, *supra* note 238, at 622; *P. Lorillard Co. v. F.T.C.*, 186 F.2d 52 (4th Cir. 1950).

²⁴² *Northern Feather Works v. F.T.C.*, 234 F.2d 335, 338 (3d Cir. 1956); *F.T.C. v. Klesner*, 280 U.S. 19 (1929).

²⁴³ *Moretrench Corp. v. F.T.C.*, 127 F.2d 792, 794 (2d Cir. 1942).

²⁴⁴ *International Parts Corp. v. F.T.C.*, *supra* note 229, at 885.

²⁴⁵ *Irwin v. F.T.C.*, 143 F.2d 316, 325 (8th Cir. 1944); *Pep Boys—Manny, Moe & Jack v. F.T.C.*, 122 F.2d 158, 161 (3d Cir. 1951); *Arnold Stone Co. v. F.T.C.*, 49 F.2d 1017 (5th Cir. 1931).

²⁴⁶ *F.T.C. v. Raladam Co.*, *supra* note 233, at 646-647; *Koch v. F.T.C.*, 206 F.2d 311, 319 (6th Cir. 1953).

ness from those not engaging in false advertising,²⁴⁷ or a violation of Trade Practice Rules.²⁴⁸

2. *Judicial Enforcement of Commission Authority*

The discretion of the Commission in the selection of a remedy and the framing of its orders has undergone substantial modification over the years. In the earlier years, the courts showed little reluctance to rewrite Commission orders. Then following a series of Supreme Court decisions, most of which did not relate to the work of the Federal Trade Commission, the principle was established that the administrative agencies have a large measure of autonomy in writing their remedial orders.

a. *A Broad Discretion in Commission Orders*

The explicit affirmance of the newly recognized discretion of the Commission in the drawing of its orders came in an opinion involving a misleading corporate name. Judge Learned Hand expressed the ruling principles as follows:

However, . . . the Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts. Such tribunals possess competence in their special fields which forbids us to disturb that measure of relief which they think necessary. In striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme. . . . Congress having now created an organ endued with the skill which comes of long experience and penetrating study, its conclusions inevitably supersede those of the courts, which are not similarly endowed.²⁴⁹

This ruling is generally accepted as authoritative, but in a proceeding involving a long used trade name, "Alpacuna," the court's expression of its view that the Commission's order of complete prohibition was unduly harsh was accompanied by an affirmance of the order.²⁵⁰ An appeal in behalf of "Alpacuna" was taken. Mr. Justice Douglas expressed the Supreme Court's strong affirmance of the broad discretion of the administrative agency in the matter of remedies, but noted that the public policy of protecting valuable business assets, such as a trade

²⁴⁷ F.T.C. v. Winsted Hosiery Co., *supra* note 232, at 493; Ford Motor Co. v. F.T.C., *supra* note 213, at 182; Alberty v. F.T.C., *supra* note 222, at 670; Dr. W. B. Caldwell v. F.T.C., *supra* note 222, at 890-891; Electro Thermal Co. v. F.T.C., 91 F.2d 477 (9th Cir. 1934); F.T.C. v. Real Products Corp., 90 F.2d 617, 619 (2d Cir. 1934); F.T.C. v. Artloom Corp., 69 F.2d 36, 38 (3d Cir. 1934).

²⁴⁸ Prima Products v. F.T.C., 209 F.2d 405, 407-408 (2d Cir. 1954).

²⁴⁹ Herzfeld v. F.T.C., 140 F.2d 207, 209 (2d Cir. 1944).

²⁵⁰ Jacob Siegel Co. v. F.T.C., *supra* note 219, at 755-756. See also Parke, Austin & Lipscomb v. F.T.C., 142 F.2d 437, 441-442 (2d Cir. 1944).

name, made it appropriate to call upon the Commission to consider if some remedy "short of excision" would protect the public from deception.²⁵¹ The new responsibility imposed upon the administrative agencies with the grant of wide discretion in writing orders is even more essential than deferring to their findings of fact. In the field of trade regulation, it is less important that an order follow legal precedent than that it fit the patterns of competition of the industry to which it is applied.

The Commission has issued somewhat more inclusive orders in some recent cases. Thus, two sellers of scalp treatments and medications for baldness have been prohibited for making false advertising claims of the type condemned, not only with respect to present scalp preparations, but also with respect to "any other preparations for use in the treatment of hair and scalp conditions."²⁵²

b. *A Requirement of Affirmative Disclosure*

The Commission has required affirmative disclosures respecting a number of drugs and cosmetics. To support such orders, it must find "(1) that failure to make such statement is misleading because of the consequences from the use of the product, or (2) that failure to make such statement is misleading because of the things claimed in the advertisements."²⁵³ When it has failed to make the requisite findings, its orders have been modified;²⁵⁴ where the necessary findings are made, its requirements of affirmative disclosures have been affirmed.²⁵⁵ Affirmative disclosures may also be required for products not falling within the Wheeler-Lea categories.²⁵⁶

Despite the broad discretion enjoyed by the Commission with respect to its orders, a number of such orders relating to misleading advertising and similar deceptive practices have been modified. In several modification orders, the courts have seemed more sensitive to the needs of the seller than to the protection of the buyer.²⁵⁷ In the

²⁵¹ *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608 (1946). See also *F.T.C. v. Mandel Bros.*, 359 U.S. 385, 391-393 (1959); *Alberty v. F.T.C.*, 182 F.2d 36, 41 (D.C. Cir. 1950).

²⁵² *Erickson, Hair and Scalp Specialists v. F.T.C.*, 272 F.2d 318 (7th Cir. 1959); *Voss Hair Experts v. F.T.C.*, 275 F.2d 24 (5th Cir. 1960). See also *Niresk Industries v. F.T.C.*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960).

²⁵³ *Alberty v. F.T.C.*, *supra* note 251, at 39.

²⁵⁴ *Ibid.*

²⁵⁵ *Ward Laboratories v. F.T.C.*, 276 F.2d 952 (2d Cir. 1960), *cert. denied*, 364 U.S. 827 (1960); *Keele Hair & Scalp Specialists v. F.T.C.*, 275 F.2d 18 (5th Cir. 1960); *Feil v. F.T.C.*, 285 F.2d 879 (9th Cir. 1960).

²⁵⁶ *Theodore Kagen Corp. v. F.T.C.*, 283 F.2d 371 (D.C. Cir. 1960). The product here was watch cases.

²⁵⁷ *Kidder Oil Co. v. F.T.C.*, *supra* note 226; *F.T.C. v. Hires Turner Glass Co.*, 81 F.2d 362 (3d Cir. 1936); *Procter & Gamble Co. v. F.T.C.*, *supra* note 232.

medical and cosmetic cases, the justification for the modifications of the orders are difficult to appreciate.²⁵⁸ Those modifications of orders which related to trade names present distinct issues of public policy.²⁵⁹

3. *Enforcement Orders*

No study has been made of the enforcement orders of the courts with respect to the Commission's advertising cases.²⁶⁰ A very brief survey of the fines imposed for violations of court decrees and Commission orders would indicate that pecuniary penalties are not an important factor in seeking better compliance. The penalties are too small to have any deterrent effect. For example, P. Lorillard Co. was fined \$40,000 for violation of a cease and desist order.²⁶¹

In one criminal contempt proceeding, the court found three corporate officers guilty of contempt and fined them as well as the corporation. Two sought reconsideration on the ground that they had no authority within their corporation to deal with advertising matters. The court rejected their argument, noting that they had a responsibility to seek a change in the corporation's policy.²⁶²

Injunction proceedings have not been a prominent part of the Commission's regulatory activities, and no study has been made of these cases. In addition to its injunction powers under the Wheeler-Lea amendments with respect to food, drugs, cosmetics, and devices (section 13), the Commission has injunctive powers under the Wool (section 7) and Textile Fiber (section 8) acts, and condemnation and injunction powers under the Fur (section 9) and Flammable Fabrics (section 6) acts.

CONCLUDING OBSERVATIONS

False advertising is a by-product of the compulsions of a competitive economy. It can only be controlled by unending surveillance. The law has made good progress in establishing workable legal principles, but administrative practice has lagged in accomplishing what the law now permits or directs. Both business and the consuming public

²⁵⁸ *Gelb v. F.T.C.*, 144 F.2d 580 (2d Cir. 1944); *Ultra-Violet Products Co. v. F.T.C.*, 143 F.2d 814 (9th Cir. 1944); *D.D.D. Corp. v. F.T.C.*, *supra* note 237; *Belmont Laboratories v. F.T.C.*, 103 F.2d 538 (3d Cir. 1939); *Lekas & Drivas v. F.T.C.*, 145 F.2d 976 (2d Cir. 1944); *Folds v. F.T.C.*, 187 F.2d 658 (7th Cir. 1951); *Rhodes Pharmacal Co. v. F.T.C.*, 208 F.2d 382 (7th Cir. 1953); *Dolcin Corp. v. F.T.C.*, 219 F.2d 742 (D.C. Cir. 1954); *Sewell v. F.T.C.*, 240 F.2d 228 (9th Cir. 1956).

²⁵⁹ *Jacob Siegel Co. v. F.T.C.*, *supra* note 251; *F.T.C. v. A.P.W. Paper Co.*, 328 U.S. 193 (1946); *Elliott Knitwear v. F.T.C.*, *supra* note 231.

²⁶⁰ Federal Trade Commission, Statutes & Decisions, include sections in each volume reporting the "Penalty Proceedings."

²⁶¹ *P. Lorillard Co.*, 267 F.2d 439 (4th Cir. 1959).

²⁶² *In re Dolcin Corp.*, 247 F.2d 524, 534 (D.C. Cir. 1956).

would benefit by more effective control of false advertising. And more effective control is attainable with a few clearly indicated changes in legislative directives and administrative procedures.

1. Accomplishments in Control of Misleading Advertising

The most important advances in coping with false advertising have come in the train of the Wheeler-Lea amendments of 1938. The definition of false advertising as an advertisement that is false in any material fact or that fails to disclose a material fact has greatly strengthened the authority of the Federal Trade Commission. The Commission's powers have been further enhanced by specific legislation covering the marketing of wool, furs, and textile fibers—supplying additional legislative safeguards against false advertising. These Congressional determinations of what constitutes falsity in advertising have been used by the Commission and the courts, not only for the commodities specifically covered, but also for commodities in general, both in cases arising under sections 12 to 15 and those brought under section 5. This is consistent with the legislative provision that violations of these special sections shall be considered to be violations of section 5. The influence of the strict standards in the later statutes may be seen particularly in Commission orders requiring affirmative disclosures to permit consumers to evaluate products more accurately.

The Commission has notable achievements to its credit in the application of the statutory standards to a wide variety of false advertising problems. Many of the worst aspects of advertising of a generation ago have been largely eliminated. The courts have contributed materially to the more effective policing of advertising: upholding the primary responsibility and competence of the Commission to determine the facts, to weigh the evidence, to draw reasonable conclusions on the basis of the Commission's extensive experience with the strategies and tactics of competition, and to prescribe effective remedies; rejecting the specious defenses that have been offered for false advertising; insisting upon the superior rights of the honest competitor and the public to protection against unfair and deceptive advertisements.

The control of false advertising calls for continuous policing. It is a responsibility for both business and government. Business can help by using the Trade Practice Conference procedure to establish high standards of truth in advertising and by reporting all observed instances of false advertising to the Commission. Business has a high stake in bringing probity to advertising; in the long run business suffers when the public loses confidence and comes to realize that it can expect only deceit in an industry's advertising. And, of course, individual

companies suffer when unfair advertising diverts patronage that would normally come to them. The advertising industry has the greatest interest in maintaining high standards of integrity in advertising, for if the public comes to regard advertising as pervasively false and misleading, advertising will cease to have value to industry and commerce, distributors will have to develop other techniques for achieving and maintaining mass markets, and advertising specialists will have to seek new occupations. However, a large responsibility for maintaining non-deceptive advertising must be carried by the government—to deal with the unscrupulous, to police industries lacking in ethical standards, and to apply critical judgment to new advertising tactics and new products.

2. Requisites for More Effective Control of Advertising

More effective control of false advertising is possible and desirable. More effective administration is called for to apply higher standards of advertising broadly and generally to all industries and all markets. Better coverage in policing is required in the interests of business, particularly within individual industries, to eliminate competitive inequities that arise when some, but not all, members of an industry are subject to cease and desist orders respecting false advertising.

a. Conceptual Tools for Regulation

The criteria for identifying false advertising under the Wheeler-Lea provisions are admirably designed for their task. The same criteria should apply to false advertising as a “deceptive practice” under section 5.

These criteria, while helpful, are not adequate when “false advertising” is an unfair method of competition. Here deception of the public and injury to competitors are not enough.²⁶³ The essence of the offense under the “unfair competition” test is the interference with the efficient functioning of the markets upon which the soundness of the entire economy depends. It is in this sense that false advertising, like other forms of unfair competition, is a public offense (rather than a private wrong), and it is the impairment in the efficiency of the economy that makes honest, informative advertising—and the avoidance of false advertising—a matter of solid public interest.

b. The Advertising Agencies

The brinkmanship that is responsible for many false advertising cases involving reputable firms and reputable products is in significant

²⁶³ In a normal market situation, competitors would suffer more from the honest advertising of a good product than from the deceptive advertising of a poor product.

measure the result of rivalry among advertising agencies, each anxious to demonstrate its ability to increase its client's sales. While the advertiser must approve the program submitted by the agency, it is the agency which generates the deceptions, sometimes without its client's knowledge. It is, therefore, wholly appropriate that the agency as well as the advertiser should be joined in the complaints and orders of the Commission—each is a beneficiary of the deceptive advertising, each should bear the public opprobrium of being branded as engaging in false advertising, deceptive practices, and disruption of markets. With the agencies regularly joined in Commission cases, the advertisers might begin to choose between those agencies which do a skillful job and those which bring their clients unfavorable publicity.

In the Carter's Little Liver Pill case, the Commission's opinion indicated that it would expect its staff to cite the advertising agencies in every case when the facts might warrant.²⁶⁴ However, the inclusion of the advertising agency has attracted attention only with the Commission's drive against false demonstrations and other deceptions in television advertising. The television demonstrations of aerosol shaving creams have educated the public in the techniques of false demonstrations. The appearance of superiority of "Rise" in comparison with "ordinary" shaving creams was achieved with the use of a ten percent solution of "ultra-wet 60L," a foaming agent having none of the properties of a shaving cream, but prepared so that it would come out of the can "in a good puff and would quickly disappear."²⁶⁵ Colgate's "Rapid Shave" cream was falsely demonstrated as shaving sandpaper, but the television "sandpaper" was a plexiglass mock-up and the cream would not moisturize real sandpaper in any reasonable length of time.²⁶⁶ The Commission rejected the arguments of Ted Bates that it should not be joined in the order on grounds that it was not engaged in commerce,²⁶⁷ that it was merely an agent of Colgate in preparing and placing the television commercials,²⁶⁸ and

²⁶⁴ Carter Products, Inc., 47 F.T.C. 1137, 1170 (1951).

²⁶⁵ Carter Products, Inc., Sullivan, Stauffer, Colwell & Bayles, Inc., No. 7943, FTC, Apr. 25, 1962.

²⁶⁶ Colgate-Palmolive Co., Ted Bates & Co., No. 7736, FTC, Dec. 29, 1961.

²⁶⁷ The Commission replied: "There is no dispute that Bates prepared and placed for showing, over national network television, these commercials for 'Palmolive Rapid Shave,' a product distributed in interstate commerce. In the light of the precedents, one can hardly doubt the Commission's jurisdiction over an enterprise so basic to the flow of goods into the national market."

²⁶⁸ The Commission retorted: "All that is necessary to establish liability in this type of case is that the corporate officer 'be shown to have had such connection with the wrong as would have made him an accomplice were it a crime, or a joint tortfeasor, were the corporation an individual.'"

that it did not know that its "sandpaper test" commercials would be held to be false and misleading. A number of similar cases have been settled by consent orders.²⁶⁹

c. *A Show Cause Procedure*

The Commission has the "burden of proof" in establishing the facts with respect to the false or deceptive character of advertising. Why should the burden of proof be on the Commission? Where an advertiser makes affirmative factual claims for his product, why should he not sustain the burden of proving the accuracy of his statements?

These questions are crucial if there is to be any substantial improvement in the performance of the Commission in this area of trade regulation. If the Commission is to meet the challenge of false advertising, in behalf of the advertising industry, business generally, and the consumer, the Commission must be provided with more effective procedures.

The principal obstacle to more effective control of misleading advertising is the protracted character of many cases. To satisfy the requirements of present procedures, the Commission must prove the false character of the advertisement which is already obvious to the advertiser and the Commission; the Commission must develop sources of information to supply information which is, or should be, in the possession of the advertiser; and the Commission must satisfy a litigation procedure which is unduly cumbersome for this type of case. All of this could be changed by legislation which would prescribe a "show cause" procedure for advertising cases.

Under a show cause procedure, the Commission would be required to proceed by issuance of a complaint which would set forth the *prima facie* basis for believing that a particular advertisement is false and misleading. The complaint might be directed against an individual advertiser, as an individual or as a representative of an industry or trade, or against all members of an industry or trade. In any advertising case, other members of the industry or trade should have the right to intervene. The complaint should set a date for a hearing within 30 days of the issuance of the complaint, but the respondent should have the right to seek a postponement for another 30 days.

The issuance of a complaint should constitute notice to the individual, or to the industry or trade, as the Commission designates,

²⁶⁹ In *Standard Brands, Inc., Ted Bates & Co.*, No. 7737, FTC, Jan. 8, 1960, the "flavor gems" seen on Blue Bonnet margarine were drops of a non-volatile liquid applied to the surface of the product and having nothing to do with the flavor.

In *Eversharp, Inc., Compton Advertising, Inc.*, No. 7811, FTC, Mar. 10, 1960, the false demonstration related to the alleged superior safety of the Schick safety razor.

that three months after the date of the complaint the challenged advertising would become a violation of the Federal Trade Commission Act, subject to all the penalties attaching to the violation of a Commission's final order. The provision for the automatic suspension of advertising covered by a complaint would serve to protect other competitors and the public if the pending litigation should become protracted. At present, one of the principal reasons for prolonged advertising litigation, from the point of view of the advertiser, is that, pending final determination, the advertiser is able to continue to profit from his advertising.

The issuance of a Commission order following final determination on a show cause proceeding should establish a "rule" or "order" applicable to all advertising of that product, or class of products, by all advertisers in that market.

d. *Penalties*

The small penalties characteristically imposed for violations of advertising orders are no deterrent. Many of the penalties are less than the cost of a single advertisement in a magazine of national circulation. The courts should levy full penalties for violations of advertising orders as an essential step in more effective enforcement.

e. *Other Measures for Controlling Deceptive Advertising*

The objective in the regulation of advertising should be informative disclosure regarding all advertised products. This is what is already required by the special laws dealing with wool products, furs, and textile fibers. The use of established technical standards, where available and applicable, and the development of quality grade labels would enable buyers to respond to advertising appeals with an intelligent examination and comparison of products. The general extension of the procedures of these special acts with the use of informative grades or standards, perhaps as a new function of the Federal Trade Commission, would do much to increase the efficiency of the entire economy and to establish reasonable equality of competitive conditions in most markets, even in some markets characterized by monopolistic conditions.